

IN THE SUPREME COURT OF MISSOURI

APPEAL No. SC92581

**WILLIAM DOUGLAS ZWEIG, *et al.*,
on behalf of themselves and all others similarly situated,**

Plaintiffs-Respondents/Cross-Appellants,

v.

**THE METROPOLITAN ST. LOUIS
SEWER DISTRICT,**

Defendant-Appellant/Cross-Respondent.

**Appeal from the Circuit Court of the County of St. Louis
Cause No. 08SL-CC03051
Hon. Dan Dildine (by order of the Missouri Supreme Court)**

**On Transfer After Opinion from the Missouri Court of Appeals, Eastern District
Appeal No. ED96110 (Consolidated with Nos. ED96165 and ED96393)**

**SUBSTITUTE BRIEF OF APPELLANT/CROSS-RESPONDENT
METROPOLITAN ST. LOUIS SEWER DISTRICT**

**KOHN, SHANDS, ELBERT,
GIANOULAKIS & GILJUM, LLP**

John Gianoulakis - #18194
Robert F. Murray - #41779
Kevin Anthony Sullivan - #55140
1 North Brentwood Blvd., Suite 800
St. Louis, Missouri 63105
(314) 241-3963 telephone
(314) 241-2509 facsimile
jgianoulakis@ksegg.com
rmurray@ksegg.com
ksullivan@ksegg.com

**METROPOLITAN ST. LOUIS SEWER
DISTRICT**

Susan M. Myers - #46208
2350 Market Street
St. Louis, Missouri 63103
(314) 768-6200 telephone
(314) 768-6279 facsimile
smyers@stlmsd.com

December 19, 2012

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JURISDICTIONAL STATEMENT

This is an appeal related to three Judgments entered by the St. Louis County Circuit Court (“Trial Court”) on three phases of hearings with respect to Plaintiffs’ challenge under Article X, Section 22(a) of the Missouri Constitution (“Hancock Amendment”) to a Stormwater User Charge adopted by Defendant Metropolitan St. Louis Sewer District (“MSD” or “District”). First, the July 9, 2010 Judgment (“Judgment”) declared that the Stormwater User Charge was a tax in violation of the Hancock Amendment (LF1541-77;A1-37). Second, the November 23, 2010 Judgment certified a class for the refund claims, denied the request for a \$90.8 million class refund, entered judgment in MSD’s favor on the refund claim, and enjoined MSD from collecting any further amounts under the Stormwater User Charge (LF1782-1806;A38-62). Third, the February 3, 2011 Judgment granted Plaintiffs’ motion for attorneys’ fees and expenses and awarded Plaintiffs’ counsel \$4,357,756.00 in attorneys’ fees (including a multiplier of 2.0) and \$471,072.28 in out-of-pocket expenses (primarily expert witness fees). (LF2636-49;A63-76.)

MSD appealed the Judgment, the injunction, and the award of attorneys’ fees and expenses to the Missouri Court of Appeals, Eastern District, and Plaintiffs, in turn, cross-appealed with respect to the denial of the refund claims. (LF2284-2390,2650-73.) MSD’s appeal and Plaintiffs’ cross-appeal were fully briefed and argued in the Court of Appeals on March 6, 2012. On March 27, 2012, the Court of Appeals issued a 2-1 decision affirming the Judgment, reversing in part the award of attorneys’ fees due to the 2.0 multiplier, and affirming the denial of the refund.

Both MSD and Plaintiffs filed applications for transfer to this Court pursuant to Mo.R.Civ.P. 83.04. On October 30, 2012, this Court sustained the applications and ordered the appeal transferred.

STATEMENT OF FACTS

Procedural Background

The Lawsuit. On July 18, 2008, Plaintiff William Zweig filed his initial, three-count Petition claiming that the Stormwater User Charge adopted by MSD was a tax in violation of Section 22(a) of the Hancock Amendment (Mo. Const. art X, §22(a)) because it was not approved by District voters. (LF745.) A Second Amended Petition was filed on July 24, 2009, which added two more named Plaintiffs, David Milberg and Mark Kurz. (LF435-36.) This Petition sought declaratory and injunctive relief with respect to the alleged violation of the Hancock Amendment and further sought a refund of all amounts collected by MSD under the Stormwater User Charge as a class action. (LF436-51.) At no time did Plaintiffs seek a TRO or preliminary injunction to stop collection of the Charge. (LF1-17.) The three named Plaintiffs each owned property within District boundaries and had paid or were paying the Stormwater User Charge at the time of trial. (Judgment (“J.”) ¶¶10-14(LF1544-46;A4-6).)

On March 13, 2009, Plaintiffs moved for class certification pursuant to Mo.R.Civ.P. 52.08. (LF42-99). On October 6, 2009, MSD and Plaintiffs agreed to a stipulation, and the Trial Court subsequently entered an Order, regarding the sequence of the case: (1) a class was certified for the claims for declaratory and injunctive relief relating to whether the Stormwater User Charge violated the Hancock Amendment, but

no class was agreed to or certified for the refund claims; (2) the case was bifurcated so that the claims for declaratory and injunctive relief would proceed to trial first; and (3) if Plaintiffs succeeded on the claims for declaratory and injunctive relief, then the refund claims (including whether a class should be certified) for the amounts collected under the Stormwater User Charge would be adjudicated in a second phase. (LF528-37.)

Additionally, on October 8, 2009, the Trial Court denied a motion to intervene brought by the McCarthy, Leonard law firm on behalf of several groups of potential class members. (LF538.)

First Phase on Hancock Issues. The first phase relating to the Hancock claims proceeded to trial on April 13-16, 2010. (LF1237.) The evidence of the parties (discussed in further detail herein) focused on whether the Stormwater User Charge was a fee or tax under the five factors set forth in *Keller v. Marion County Ambulance District*, 820 S.W.2d 301 (Mo.banc 1991). (Tr.20:4-12,51:7-11.) After post-trial briefing (LF1377-1446,1483-1523) and closing arguments on June 21, 2010, the case was taken under submission. (LF1540.) On July 9, 2010, the Trial Court entered its Judgment holding that the Stormwater User Charge was a tax after finding all five *Keller* factors in Plaintiffs' favor. (LF1575-77.) The Trial Court further held that injunctive relief would be decided in the second phase. (LF1576.)

Second Phase on Refund Issues. On October 6, 2010, evidence and argument on the second phase was presented to the Trial Court on the certification of a refund class, the claim for the refund of all \$90.8 million collected and spent under the Stormwater User Charge, and the injunctive relief. Plaintiffs did not put on any witnesses, but offered

exhibits, a stipulation on the amounts billed and collected, and another stipulation (with a binder of exhibits) originally submitted a year before pertaining to the stipulated Hancock class. (Tr.1296:1-1312:19; Pls.Ex.95.) MSD called Jan Zimmerman, Director of Finance, and Executive Director Jeff Theerman as its witnesses. (Tr.1313-1419.) In summary, Ms. Zimmerman testified about the amounts collected under the Stormwater User Charge, what MSD did after the July 2010 ruling in suspending the Stormwater User Charge and reinstituting the \$0.24 flat stormwater fee and ad valorem taxes in August 2010, the amounts expected to be collected, and other budgetary issues relating to the Trial Court's invalidation of the Stormwater User Charge. (Tr.1313:16-1351:8.) Mr. Theerman testified about the reduction of stormwater services after the July 2010 ruling, how MSD avoided employee layoffs, and the effects that a refund would have on MSD and its customers, including that MSD would need to charge its customers the amount of any refund and then repay these same customers less the 25% contingency fee sought by Plaintiffs' counsel. (Tr.1380:22-1418:24.) On November 23, 2010, the Trial Court entered its judgment that certified a class for the refund claims, entered judgment in favor of MSD and against the class on its claims for a \$90.8 million refund, and enjoined MSD from collecting its already-suspended Stormwater User Charge. (LF1805-06.)

Third Phase on Attorneys' Fees and Costs. On January 18, 2011, the Trial Court held a hearing on Plaintiffs' motion for attorneys' fees and expenses, in which evidence was presented on Plaintiffs' "lodestar" amount of attorneys' fees, the propriety of the award of a multiplier, and whether Plaintiffs could recover their litigation expenses (including expert fees) or allowable costs only. (Tr.1108-1290.) Plaintiffs called Richard

Hardcastle, its lead trial counsel, and an expert witness, Maurice Graham. (Tr.5:13-19.) In summary, Mr. Hardcastle testified about Plaintiffs' counsel's time, billing, and rates, deductions made to the time and billing, and their costs, in particular their experts' expenses. (Tr.1109-1180.) Mr. Graham opined that Plaintiffs' counsel's rates and hours were appropriate and that a multiplier was warranted in a class action of this type. (Tr.1181-1231.) MSD offered the testimony of its expert, Jay Levitch, who opined that certain of Plaintiffs' counsel's time entries were not recoverable, that Plaintiffs did not prevail on the refund claim, that some hourly rates were too high, and that a multiplier of attorneys' fees had never been awarded in Missouri (with which Mr. Graham concurred) and should not be awarded in this case. (Tr.1232-1287.) On February 3, 2011, the Trial Court granted Plaintiffs' motion and awarded Plaintiffs' counsel a total amount, including the multiplier of 2.0, of \$4,357,756.00 in attorneys' fees and \$471,072.28 in out-of-pocket expenses with no deduction from Plaintiffs' request, including for time spent on the refund claims on which Plaintiffs did not prevail. (LF2648-49.)

Appeal Before Court of Appeals. MSD appealed the Hancock Judgment and the award of attorneys' fees and expenses, and Plaintiffs cross-appealed the denial of their refund claim to Court of Appeals, Eastern District. After full briefing and oral argument, on March 27, 2012, the Court of Appeals issued its majority opinion ("App.E.D.Op.") authored by Judge Romines. The majority opinion affirmed the Trial Court's Hancock Judgment and held four of the five *Keller* factors in Plaintiffs' favor, but held that the Trial Court erred in finding the fourth factor (did MSD provide a service) in Plaintiffs' favor. (App.E.D.Op. at 3-12;A79-88.) On the attorneys' fees and expenses issue, the

majority opinion reversed the Trial Court's award of a multiplier of 2.0 on the amount of attorneys' fees awarded and affirmed the Trial Court's award of fees on the refund claim and of expert and other expenses. (App.E.D.Op. at 12-19;A88-95.) Finally, the majority opinion affirmed the Trial Court's denial of plaintiff's \$90.8 million refund claim. Judge Mooney dissented. He would have ruled in MSD's favor on the Hancock issue on the basis that the Stormwater User Charge was individualized and variable, was based on the industry standard, was supported by engineering principles, and equitably apportioned the costs of providing services. (App.E.D.Dis.Op. at 1-2;A96-97.)

Factual Background¹

What Are Stormwater Services? At their most basic level, stormwater services deal with the impacts caused by increased runoff created by development and impervious area. (Tr.715:1-14,790:19-25,792:4-7.) In a developed, urban area like St. Louis, this increased runoff creates the need for a man-made system (e.g., storm sewers, drainage channels, and inlets) that must be constructed, operated, and maintained to ensure that, in large storms, the resulting runoff will drain and not cause flooding. (375:1-14,708:11-21, 710:2-713:25,758:17-24,1004:24-1005:6; Ex.44 at 158:15-22.) Development and increased runoff also cause creek erosion and degrade water quality. (Tr.818:24-820:7, 1007:7-9,1009:11-14,1053:9-1056:7; Pls.Ex.75 at 160:14-161:4. Within the past decade, federal and Missouri clean water laws and regulations have mandated that urban areas served by entities like MSD receive new

¹ Additional relevant facts will be discussed in the Argument section as needed.

planning and regulatory services. (Tr.685:9-24,875:14-876:12; Def.Exs.I at 169-82, K, DDD.) For instance, with respect to planning services, design standards are required for new developments, and permitting ensures enforcement of those standards. (Def.Ex. FFF.) With respect to regulatory services, water quality must be monitored, creeks must be walked to locate illegal discharges, and public education must be performed. (Tr.594:3-20,1014:2-1017:5; Def.Ex.DDD.)

These stormwater services cost money. (Tr.699:6-700:4; Pls.Ex.80 at 137:4-12.) Nationally, the movement has been to perform these services through a stormwater utility (like MSD) funded by a utility user charge. (Def.Ex.WW at 117; Tr.834:3-836:25.) The industry standard of measurement used by stormwater utilities for their user charges has been impervious area. (Def.Ex.WW at 124; Tr.609:23-610:19.) This is because impervious area is objectively measured, easy to understand, and causes the demand for the services. (Def.Ex.WW at 121; Tr.714:1-23,852:19-853:13.) Even the federal government has recognized the necessity of stormwater user charges based on impervious area. *See* 33 U.S.C. §1323 (amending the Clean Water Act to require the federal government to pay local stormwater fees).

MSD and Stormwater. MSD is both a wastewater utility and a stormwater utility created in 1954 under a special provision of the Missouri Constitution (Article VI, Section 30) through the adoption of a Charter (Plan) by the voters of St. Louis City and County. (J. ¶¶8-9,15(LF1544,1546;A46,A6); Pls.Ex.22 §§1.010, 3.010-040.) MSD is governed

by a six member board comprised of three members appointed by St. Louis City's Mayor and three by the St. Louis County Executive (both of whom may remove members). (Pls.Ex.22 §§5.010,.030.) The administration and day-to-day operations of MSD are the responsibility of the Executive Director, who at all relevant times in this case was Jeff Theerman. (Pls.Ex.22 §6.010.)

Pursuant to its Charter, MSD is charged with maintaining, operating, reconstructing, and improving storm sewer and drainage systems and facilities within MSD's boundaries, which include all of St. Louis City and the vast majority of St. Louis County. (Pls.Ex.22, §§2.010,3.020; Def.Ex.B at 1-2(A98-99).) MSD serves some 480,000 stormwater customers, covering an area with 1.4 million people. (Refund J. ¶13 (A42).) While MSD had provided some stormwater services in some parts of the District since 1956, it was not until 1989 that MSD adopted a policy to regulate, operate, and maintain parts of the stormwater system throughout the District, but only the parts dedicated to MSD and then only "to the extent of available funds for such purposes." (Def.Ex. B at 2(A99); Tr.704:14-22.)

In order to provide stormwater services, MSD is authorized to establish rates and charges to its customers. (Pls.Ex.22 §3.020; Def.Ex.A4.) MSD funds its wastewater services through a Wastewater User Charge based primarily on the industry standard of water usage approved in *Missouri Growth Association v. Metropolitan St. Louis Sewer District*, 941 S.W.2d 615 (Mo.App.E.D. 1997). Prior to the Stormwater User Charge, MSD's *stormwater* services were funded by: (1) ad valorem property taxes (\$0.02 per \$100 assessed value throughout MSD and an additional \$0.05 in the original MSD area),

(2) special operation, maintenance and capital improvement (“OMCI”) ad valorem property taxes (at varying rates in 21 sub-districts), and (3) a \$0.24 per month flat charge that was added to each wastewater customer’s bill. (J. ¶20 (LF1547;A7); Tr.667:19-668:22,957:24-960:10.) Tax-exempt, non-profit, and governmental entities paid the \$0.24 flat fee, but did not pay the ad valorem property taxes. (J. ¶21(LF1547;A7); Tr.626:13-23.) There is no correlation between property value and stormwater services. (Tr.625:9-14,625:22-626:5.)

The ad valorem taxes and \$0.24 flat fee generated approximately \$13 million per year (\$1.2 million from the flat fee), and the OMCI taxes generated an additional \$8-\$9 million per year, for a total of \$21-\$22 million annual stormwater revenues. (J. ¶23 (LF1548;A8); Pls.Ex. 79 at 40:16-25.) In order to fund even the limited stormwater services MSD was providing, a subsidy from MSD’s wastewater operations of \$19-20 million per year was required. (Pls.Ex.38 at 9:21-10:4,12:1-8; Def.Ex.H at 48-49; Tr.684:5-7,958:17-959:3.)

Even with the subsidy from wastewater, stormwater services were not provided at an adequate level because of the lack of revenue; for instance, no preventive maintenance was performed, no infrastructure improvement occurred, and repairs were performed only on an emergency basis, despite complaints from customers and municipal leaders. (Pls.Ex.2 at 3; Pls.Ex.25 at 22; Pls.Ex.38 at 10:14-15; Pls.Ex.44 at 104:24-105:11; Def.Ex.H at 90; Tr.667:19-668:22,682:24-684:4,687:13-688:17,1001:6-22.) Mr. Theerman’s undisputed testimony at trial on this point was:

[O]ur stormwater service was inadequate because of funding; and because we had differing tax rates in differing areas, the service was somewhat different. The original service area had a Five Cent stormwater tax that generated some revenue, and our level of service in that area was inadequate but better than the annexed area or the western part of the county, north and western part of the county where all we had was a Two Cent tax. So we did no real infrastructure reinvestment. We didn't do repairs to the system as it deteriorated except on emergency basis. When we were called by customers to come to their homes, we would typically go but oftentimes the answer to whatever the problem that they were telling us about was "We don't have funding. We can't help." We did things like stormwater inlet cleaning in the Combined Sewer Area to prevent flooding. If there were cave-ins in yards from deteriorating pipes, oftentimes our solution was to backfill the hole so that the hole was gone but not really repair the pipe itself. . . . [T]he funding system was inadequate and we were subsidizing it out of our wastewater rate to have the bare bones sort of emergency service that we had.

(Tr.682:24-684:4.) Thus, essentially no service was provided in the annexed (more western) area of the District, while OMCI sub-districts (special districts set up under the Charter to collect revenues for stormwater service) might receive a reasonably adequate level of service. (Pls.Ex.43 at 18; Def.Ex. H at 90-91; Tr.687:13-688:19,682:24-685:8.) The Stormwater User Charge was adopted to replace this unfair and inadequate structure

of revenue and services. (Tr.667:19-669:6,1001:23-1002:12; Pls.Ex.25 at 22; Pls.Ex.44 at 22:15-23:10.)

Adoption of Stormwater User Charge. Compounding these service and funding issues was the fact that MSD's Rate Commission,² while considering a wastewater rate proposed in 2003, advised MSD to eliminate the wastewater subsidy and adopt a self-sustaining revenue source for stormwater services. MSD agreed. (Tr.667:19-668:22.) Meanwhile, MSD's regulatory and planning stormwater services were increased as a

² In 2000, the voters amended MSD's Charter to create an independent Rate Commission (modeled on the Public Service Commission) to review and make recommendations on all changes to MSD rates, charges, or taxes in a transparent process. (Pls.Ex.22 §7.040; Tr.635:9-18,661:19-662:20,695:2-25.) The Commission is comprised of 15 diverse representative organizations (each of which designates its representative) and recommends a rate or charge proposed by MSD's staff based on five criteria: (1) is it consistent with constitutional, statutory and common law; (2) does it enhance the ability to provide adequate systems, facilities, and services; (3) is it consistent with bond or indebtedness covenants and provisions; (4) is the ability to comply with federal and state laws and regulations impaired by it; and (5) does it impose a fair and reasonable burden on all classes of ratepayers. (Pl.Ex.22 at §§7.230,.270; Def.Ex.H at 12; Tr.696:6-21.) In turn, MSD's Board must accept the Rate Commission's recommendation unless the Board finds that the rate or change violates the five criteria. (Pls.Ex.22 §§7.260,.300; Tr.690:11-25.)

result of new requirements under federal and state clean water laws and regulations, causing MSD to become the lead permittee for the region's Phase II Stormwater Permit, the first of which was issued in 2003. (Def.Exs. I,J,NN,OO,DDD; Tr.1007:2-1011:8.) Therefore, in 2005, MSD turned its attention to the Stormwater User Charge. (Tr.689:9-690:4.) Over the next two years, MSD developed the Stormwater User Charge with the assistance of rate consultants with nation-wide experience and, in February 2007, delivered a rate proposal to the Rate Commission. (Def.Exs.H at 21-23, N; Tr.690:11-25, 848:15-849:23.)

In its Rate Proposal, MSD proposed to fund what it then called "basic" stormwater services – operation, maintenance, regulatory, and planning – through a variable Stormwater User Charge based on the amount of impervious area on each parcel of property (areas that do not absorb water like driveways, roofs, and patios). (Def.Ex.N at 4-1-4-16.) A charge based on impervious area was chosen because impervious area drove the demand for MSD's services and thus affected the costs of providing those services. (Def.Exs.H at 145-46, WW at 119, 121; Pls.Ex.80(Vol.II) at 137:4-12; Tr.664:23-670:8,699:6-700:4,708:11-21.)

Moreover, a charge based on impervious area is easily understood, fair, and equitable to customers, and such charges are the industry standard used by the majority of stormwater utilities. (J. ¶34(LF1551;A11); Tr.348:15-350:24,396:4-17,609:23-612:10, 856:10-19.) Impervious area is a fair and objective measure because the characteristics of impervious area will not vary significantly from property to property, whereas other characteristics such as soil type, slope, and vegetation may vary significantly from

property to property. (Tr.611:15-613:21.) It would be impracticable to base any stormwater charge on such variable characteristics because each property would need to be studied, thereby making the charge cost-prohibitive. Moreover, MSD does not engage in such a minute analysis in calculating runoff. (Tr.586:24-587:4,603:10-605:1,777:5-778:8, 857:22-858:14.) In any event, such characteristics do not vary in the standard formula used to calculate runoff from an area, while impervious area is the only variable in the equation (i.e., the number for impervious area changes, while the numbers for total area, rainfall, and other factors remain the same). (Tr.285:6-286:7,289:14-290:2, 1022:19-1024:12.)

MSD further proposed to fund what it called “enhanced” stormwater services – undefined services, but likely construction of new facilities, creek maintenance, and erosion control – through ad valorem property taxes that would be put to a vote in five new subdistricts based on the five major watersheds in MSD. (Def.Exs.H at 22-23, N at 4-12-4-14; Tr.691:1-692:20.)

The Rate Commission process involved discovery, public hearings, technical conferences, objections and analysis of intervening parties, and analysis by the Rate Commission’s own counsel and rate consultant. (Def.Ex.H at 7,16-21,82-83,144-50; Pls.Ex. 79 at 92:10-22; Tr.741:10-17.) After six months of proceedings, the Rate Commission issued a comprehensive report which recommended that MSD adopt a Stormwater User Charge based on impervious area, and not any ad valorem taxes, to fund *all* stormwater services. (Def.Ex.H at 7,16-21,82-83,144-50; Pls.Ex.79 at 92:10-22; Tr.741:10-17.) The Commission found that MSD’s stormwater services had been

provided at an unacceptable level because of the unfair and inadequate revenue system. (Def.Ex.H at 90-91.) It further found that the stormwater service level proposed by MSD and the Stormwater User Charge passed the criteria set out in the Charter, including the conclusion that the Charge was not a tax. (*Id.* at 6-7,75-80,82-85.) The Rate Commission rejected the use of ad valorem taxes because tax exempt entities would not pay those taxes, thereby resulting in continued inequities among customers. (*Id.* at 149-50; Def.Ex.QQ at 164-172; Tr.695:2-22.)

MSD's Board accepted the Commission's recommendation, but extended the phase-in of the rate from five to seven years to lessen the burden on customers. (Tr.697:7-22.) In turn, after the submission of a new proposal, in March 2008, the Commission recommended the adoption of the Stormwater User Charge with a schedule of rates resulting in an average charge of \$4 to \$7 per month. (Def.Ex.QQ; Tr.698:6-700:4.)

Implementation of Stormwater User Charge. MSD adopted Ordinance 12560 (Def.Ex.B (A98)) in December 2007, effective March 1, 2008,³ which set the Stormwater User Charge at \$0.12 per 100 square feet ("ft²") and detailed how the Stormwater User Charge is charged and collected. (Def.Ex.B(A98-114); Tr.750:1-4,850:11-20.)

³ Subsequent Ordinances 12789, 12906, and 13022 did not change the Charge in any substantive way, but primarily dealt with a rate increase and collection procedures. (Def.Exs.C-E.)

First, bills for the Stormwater User Charge were issued monthly for services provided in the preceding month, with the first bills being sent by MSD in April 2008 for services provided in March. (Def.Ex.B §12(A105); Tr.970:1-5.) Stormwater services are based on being prepared to handle stormwater from large “design storms” (15- or 20-year events) and do not depend on rainfall in a given month because MSD’s stormwater services are continuous and ongoing, meaning that MSD must have a properly functioning system in place at all times and must provide regulatory and planning services regardless of the weather. (Tr.670:20-671:4,704:6-10,705:22-706:11.) Moreover, the Ordinance provided that, in the event that impervious area was added or removed from a property, the Charge would be adjusted after the new measurement of impervious area. (Def.Ex.B §§11,12,22(A105-06,108).) The Ordinance’s billing language is the same as that used in the wastewater user charge ordinance upheld in *Missouri Growth*. (Def.Exs.B,G; Tr.675:4-9,680:16-25,681:18-682:15.)

Second, only parcels with impervious area paid the Stormwater User Charge because these improved parcels caused the need for stormwater services – the addition of impervious area to a parcel of property increases the runoff from the property and thus causes the demand for services. (Def.Ex.B at 3-5(A100-02); Tr. 894:11-895:5,1037:5-14.) These parcels would be billed regardless of whether they were tax-exempt, public, or private. (Def.Ex.B at 3,6(A100,103).) Approximately 38,000 parcels of unimproved property without impervious area would not be billed the Charge – and indeed no pervious areas on any properties would be billed – because such land in its natural state did not cause the need for stormwater services. (Pls.Ex.38 at 9:8-12; J. ¶27(LF1549;A9);

Tr.669:10-22,709:10-710:1,835:14-22.) Also, public rights of ways were exempted from the Charge because they are part of the stormwater conveyance system and are maintained by other entities. (Def.Ex.B §10(A105); Pls.Ex.38 at 9:8-12; Tr.861:4-863:8.)

Third, the Ordinance expressly linked MSD's stormwater services to the addition of impervious area and its corresponding generation of additional stormwater runoff caused by the impervious area with its definition of "Served" or "Service": "Property which contributes to Stormwater Runoff which is drained through the Stormwater System *as a result of the addition to or construction upon such Property of Impervious Surface.*" (Def.Ex.B at 3,5(A100,102) (emphasis added).) In order to assess the Charge, MSD directly measured the impervious area on each parcel of property by aerial photography and charged the customer at the adopted rate. (*Id.* §§ 11-12(A105).) Fly-overs of MSD (at a cost of about \$250,000) were scheduled every two years in order to update the impervious area on each parcel. (Tr.1036:21-1037:4.) Additionally, customers could ask MSD to update their impervious area measurement at any time. (Def.Ex.B §§11,22(A105,108); Tr.1036:6-20.) Addition or reduction in impervious areas could only be billed after the change in impervious was made. (Def.Ex.B §§11,22(A105,108).) According to Plaintiffs' expert Debo, the \$4-\$7 average monthly Stormwater User Charge was in line with what other utilities charged. (Tr.396:4-17.) The implementation of this new billing system cost MSD approximately \$1.3 million. (Tr.969:2-22.)

The Ordinance further had a credit policy: properties internally drained or draining directly to the Mississippi, Missouri, or Meramec Rivers would receive a 50%

credit, and properties whose stormwater services were provided by another entity (i.e., levee districts along the Missouri River) would receive a credit based on the percentage of service being provided by MSD. (Def.Ex.B §27(A109-10); Tr.866:11-868:1, 1041:1-13.) The 50% credit to properties internally drained or draining directly to a major river was based on the fact that these properties were receiving MSD's stormwater services only in the form of regulatory and planning services, while they were not receiving services relating to use of the stormwater system. MSD's rate consultant calculated that 50% of the costs of service related to the use of the stormwater system, so a 50% credit was allowed for these customers. (Pls.Exs.39,51; Def.Ex.V; Tr.595:19-23,782:21-783:12.) Customers could appeal their Stormwater User Charge with respect to credits, calculations of impervious area, or the amount of the Charge. (Def.Ex.B §§22-24(A108-09); Tr.1036:6-20.) Approximately 600 customers (out of 480,000) received the 50% credit. (Tr.1040:11-14.)

Fourth, the Ordinance described the stormwater services provided by MSD: (1) the basic services of planning, regulation, and operation and maintenance of the stormwater system; and (2) the enhanced services of anything beyond the basic service (e.g., new construction of infrastructure and erosion control). (Def.Ex.B at §§4,6-7 (A103-04); Pls.Ex.18 at 2-11; Tr.662:16-663:14,875:14-876:12,1028:18-1029:20.). The Ordinance further required that the revenues from the Stormwater User Charge be placed in a separate fund and used only for the provision of stormwater services. (Def.Ex.B at 4, §21(A101,108); Tr.970:6-971:20.)

Fifth, the Ordinance detailed services that MSD will not perform such as the maintenance of private facilities (e.g., detention and retention basins) and other facilities that have not been dedicated to MSD. (Def.Ex.B §§3,5, App. I(A103-04,111-13); Tr.590:17-592:9,593:13-594:2; JonesDep.Desig.328:16-329:4(LF1038-39).) These private stormwater facilities would be maintained by the owner. (Def.Ex.B §5(A104).)

Summary of Evidence During Hancock Trial. Plaintiffs' evidence began with Plaintiffs Zweig's and Milberg's testimony focusing generally on their property, their payment of the Charge, and their reasons for bringing the lawsuit. (Tr.71-159.) The bulk of Plaintiffs' evidence was provided by two expert witnesses, Professor Tom Debo (an engineering professor) and Jon Jones (an engineer), who testified for almost two days of trial about hydrology, stormwater, and the analysis they had performed regarding total stormwater runoff (water that leaves a property). (J. ¶¶59(LF1556;A16); Tr.160-656.) The vast majority of Debo's and Jones' testimony and evidence was on the third *Keller* factor (Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer?), which they applied to the Stormwater User Charge as requiring a direct relationship between the impervious area on a property and its *total* stormwater runoff. (J. ¶¶60-63(LF1556-58;A16-18); Tr.278:22-279:10,378:16-20, 439:16-20,597:10-14.) They interpreted the "direct relationship" requirement to mean that a one-to-one linear relationship needed to exist between impervious area and *total* runoff. (Tr.378:16-20,597:10-14.) As a result, Plaintiffs' experts opined that there was "little, if any" relationship between the amount of impervious area and total runoff, that total area of the property bore a better relationship to the total runoff, and that there were

other factors such as slope, soil type, and vegetation that affected the amount of total runoff. (J. ¶¶60-63(LF1556-58;A16-18); Tr.231:17-232:12,241:23-247:9,248:23-249:18, 267:9-270:21,552:15-553:19.)

Plaintiffs’ experts further testified that it was their opinion that it would be “exceedingly challenging” for MSD to meet the third *Keller* factor as they defined it and that they did not consider costs or practicality in analyzing the Stormwater User Charge (even though these considerations always were relevant in setting charges). (Tr.379:16-380:14(“costs are not involved in [Factor 3] at all”), 585:7-586:10(cost effectiveness or practicality are not a part of Factor 3 “[b]ased on my straight-forward reading of the language I’ve reviewed”), 586:24-587:4(“I have not calculated” the cost of implementing a system that would take into account slope, soil factors, soil content).)

At trial, MSD also called four witnesses: Jeff Theerman (Executive Director), Steve Sedgwick (MSD’s Rate Consultant and Expert), Jan Zimmerman (Director of Finance), and Brian Hoelscher (Director of Engineering). (Tr.4:9-5:4.) MSD’s testimony reflected the reality of MSD actually operating a stormwater utility and contrasted the academic opinions of Plaintiffs’ experts with respect to the third *Keller* factor by explaining how impervious area created the demand for MSD services (more development=more required services), how it was the additional runoff from impervious area on the property that caused the need for MSD’s stormwater services, and how variations in factors such as slope and soil content simply are not considered by MSD in actually running its utility. (Tr.669:23-670:8,727:7-729:2,777:5-778:8,835:23-836:11,859:12-864:18,875:14-877:14,1022:19-1024:12.) Further, MSD’s witnesses

testified about: why the Stormwater User Charge was developed (to provide a more acceptable level of service, institute a fair and equitable charge, and eliminate the wastewater subsidy of some \$20 million/year), how the Charge was billed (for the prior month, always in arrears, never in advance), who received the bills (customers with impervious area that contributed increased runoff, including all tax-exempt entities, but not 38,000 undeveloped parcel owners), why impervious area was chosen as the basis for the rate (industry standard measure of service that is fair and easy to understand, the impervious area drives the demand for MSD's services, and it is directly related to the increased runoff caused by impervious area on developed properties), why undeveloped, pervious area was not charged (land in natural state does not cause the need for stormwater services), what stormwater services MSD provided (operation and maintenance, regulatory, and planning), and what stormwater services were performed by others and not performed by MSD (such as maintaining detention basins and private systems and erosion control). (*See, e.g.*, Tr.348:15-350:23,609:23-610:7,667:19-668:22,970:1-5,706:12-707:3,708:11-21,723:10-724:7,772:13-20,859:12-864:18,875:14-877:14,1049:22-1051:7.)

POINTS RELIED ON

I. The Trial Court erred in declaring and holding that MSD's Stormwater User Charge was an invalid tax or impermissible broadening of the base of a tax under Section 22(a) of the Hancock Amendment because its ruling misstated the law, misapplied the law to the facts, and was against the weight of the evidence in applying the factors set forth in *Keller v. Marion County Ambulance District* and reaffirmed in *Arbor Investment*

Co. v. City of Hermann, and under a correct application of the *Keller* factors the Stormwater User Charge is a true user fee not subject to Hancock, in that:

- A. The Stormwater User Charge was due after the stormwater services were provided, and MSD's stormwater services are continuous and ongoing.
- B. The Stormwater User Charge was not blanket-billed, but was charged to all those and only those receiving stormwater services, including tax-exempt entities.
- C. The Stormwater User Charge is a variable rate charge, individualized for each customer based on each parcel's impervious area, and impervious area is the proper measure of MSD's stormwater services.
- D. MSD provides stormwater services to its customers, and the revenues from the Stormwater User Charge were used to provide those services and not paid into MSD's general revenues.
- E. In addition to MSD, private individuals and entities provide stormwater services.
- F. Other facts and law demonstrate that the Stormwater User Charge is not a tax under the Hancock Amendment.

Arbor Investment Co. v. City of Hermann, 341 S.W.3d 673 (Mo.banc 2011)

Keller v. Marion County Ambulance District, 820 S.W.2d 301 (Mo.banc 1991)

Larson v. City of Sullivan, 92 S.W.3d 128 (Mo.App.E.D. 2002)

Missouri Growth Association v. Metropolitan St. Louis Sewer District, 941 S.W.2d 615 (Mo.App.E.D. 1997)

II. In the event that the Trial Court’s July 9, 2010 Judgment is affirmed, the Trial Court erred and abused its discretion in awarding Plaintiffs’ counsel \$4,828,828.28 in attorneys’ fees and expenses because this award is unreasonable, improper, and contrary to Missouri law, in that:

- A. The unprecedented award to Plaintiffs’ counsel a multiplier of 2.0 on its “lodestar” attorneys’ fees amount is not permitted, is not supported by Missouri law, and has been specifically rejected by comparable federal caselaw.
- B. Fees for its hours spent on Plaintiffs’ unsuccessful refund claim are not recoverable because Plaintiffs were not the prevailing party on that claim.
- C. Expenses and expert fees (except for deposition time) are not recoverable under Section 23 of the Hancock Amendment or the Declaratory Judgment Act because they provide only for “costs,” which do not include expert fees under Missouri law.

Perdue v. Kenny A. ex rel. Winn, ___ U.S. ___, 130 S.Ct. 1662 (2010)

City of Burlington v. Dague, 505 U.S. 557 (1992)

O’Brien v. B.L.C. Ins. Co., 768 S.W.2d 64 (Mo.banc 1989)

Kaplan v. U.S. Bank, N.A., 166 S.W.3d 60 (Mo.App.E.D. 2003)

ARGUMENT

Standard of Review

In reviewing a court-tried case, the appellate court should sustain the trial court’s judgment “unless there is no substantial evidence to support it, unless it is against the

weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo.banc 1976). However, no deference is afforded the trial court’s conclusions of law, and the appellate court will “independently evaluate whether the trial court properly declared or applied the law to the facts presented.” *Transcont’l Holding Ltd. v. First Banks, Inc.*, 299 S.W.3d 629,643 (Mo.App.E.D. 2009); *Mullenix-St. Charles Props., L.P. v. City of St. Charles*, 983 S.W.2d 550,554-55 (Mo.App.E.D. 1998).

Moreover, when the evidence is not controverted and the sufficiency of evidence is not at issue, no deference is due the trial court’s judgment. *St. Charles County Convention & Sports Facilities Auth. v. Mydler*, 950 S.W.2d 668,670 (Mo.App.E.D. 1997); *Bremen Bank & Trust Co. v. Muskopf*, 817 S.W.2d 602,604 (Mo.App.E.D. 1991); *see also Hoffman v. City of Town & Country*, 831 S.W.2d 223,225 (Mo.App.E.D. 1992) (no deference was due where experts used different sets of facts and no credibility finding was made by trial court). This is particularly true here because the Trial Court made no credibility findings, and there were no real factual disputes. Rather, the issue was the legal conclusion and inferences drawn from the undisputed facts. Furthermore, the review of constitutional challenges under the Hancock Amendment is de novo. *Sch. Dist. of Kans. City v. State*, 317 S.W.3d 599,604 (Mo.banc 2010); *Franklin County ex rel. Parks v. Franklin County Comm’n*, 269 S.W.3d 26,29 (Mo.banc 2008); *see also Akers v. City of Oak Grove*, 246 S.W.3d 916,919 (Mo.banc 2008) (“Constitutional interpretation is a question of law and is subject to *de novo* review.”).

An award of attorneys' fees is reviewed for abuse of discretion. *Alhalabi v. Mo. Dep't of Natural Res.*, 300 S.W.3d 518,530 (Mo.App.E.D. 2009). A trial court's failure to properly declare or apply the law is an abuse of discretion. *Polish Roman Catholic St. Stanislaus Parish v. Hettenbach*, 303 S.W.3d 591,595,605 (Mo.App.E.D. 2010).

I. THE TRIAL COURT ERRED IN DECLARING AND HOLDING THAT MSD'S STORMWATER USER CHARGE WAS AN INVALID TAX OR IMPERMISSIBLE BROADENING OF THE BASE OF A TAX UNDER SECTION 22(A) OF THE HANCOCK AMENDMENT BECAUSE ITS RULING MISSTATED THE LAW, MISAPPLIED THE LAW TO THE FACTS, AND WAS AGAINST THE WEIGHT OF THE EVIDENCE IN APPLYING THE FACTORS SET FORTH IN *KELLER V. MARION COUNTY AMBULANCE DISTRICT* AND REAFFIRMED IN *ARBOR INVESTMENT CO. V. CITY OF HERMANN*, AND UNDER A CORRECT APPLICATION OF THE *KELLER* FACTORS THE STORMWATER USER CHARGE IS A TRUE USER FEE NOT SUBJECT TO HANCOCK.

Introduction

As a challenge to MSD's Stormwater User Charge under the Hancock Amendment, this case must be decided under the five factors developed by *Keller v. Marion County Ambulance District*, 820 S.W.2d 301 (Mo.banc 1991), and its progeny through *Arbor Investment Co. v. City of Hermann*, 341 S.W.3d 673 (Mo.banc 2011). The

factors are not meant to be determinative by an “arithmetic score,”⁴ but are to be evaluated together with no one factor controlling. *Id.* at 682 (citing *Keller*, 820 S.W.2d at 304 n.10). Moreover, in *Hancock* cases, this Court has repeatedly noted, today and even prior to *Keller*, that the traditional distinction between a tax and fee must be kept in mind: “*Leggett* teaches, and *Roberts* agrees, that an exaction demanded by the government for a special privilege or for specific purposes and not intended to be paid into the general fund to defray general public needs or governmental expenditures is not a tax.” *Tax Increment Fin. Comm’n v. J.E. Dunn Constr. Co.*, 781 S.W.2d 70,77 (Mo.banc 1989) (citing *Leggett v. Mo. St. Life Ins. Co.*, 342 S.W.2d 833,875 (Mo.banc 1960), and *Roberts v. McNary*, 636 S.W.2d 332 (Mo.banc 1982)); *see also Zahner v. City of Perryville*, 813 S.W.2d 855,858-59 (Mo.banc 1991); *Keller*, 820 S.W.2d at 303-04; *Arbor*, 341 S.W.3d at 679.

In *Arbor*, a case decided after the Trial Court entered its Judgment, this Court unequivocally reaffirmed the use of the five *Keller* factors and explained how these factors are to be applied. 341 S.W.3d at 678-86. In doing so, *Arbor* clarified several issues regarding *Hancock* challenges. First, *Arbor* omits the anti-tax rhetoric about distrust of government and the abuse of increased tax burdens favored by the Trial Court, the Court of Appeals majority, and Plaintiffs. Rather, *Arbor* objectively examines the

⁴ The Trial Court misstated the law when it held that “Missouri courts have adopted a mathematical application of the *Keller* factors” (J. ¶97(LF1566;A26)), a notion that MSD repeatedly contended was incorrect (LF1484) and which was firmly rejected by *Arbor* and other cases.

charge at issue and determines whether it is or is not a tax. *Arbor* also recognizes that the Hancock Amendment is not a cure-all for all perceived wrongs committed by political subdivisions that provide services. *Id.* at 679, 687.

Second, *Arbor* demonstrates that the *Keller* analysis is quite straightforward. This Court spent as little as one paragraph (Factor 4) and as many as three paragraphs (Factor 5) in deciding the factors. *Id.* at 684-86. This is in stark contrast to the tortured and unnecessarily complex analysis engaged in by the Trial Court (e.g., Factor 3 took seven pages) and the Court of Appeals (e.g., Factor 1 took three pages). *Arbor* further confirmed that no factor was dispositive. *Id.* at 682, 686. In ruling on the factors, this Court used the very same analysis advocated by MSD at trial and before the Court of Appeals, which both courts below ignored. A short, straightforward synthesis of *Arbor* and the Stormwater User Charge establishes the error of the Trial Court's Judgment finding the Charge was a tax under Hancock.

Factor 1 – When Is the Fee Paid? – For Factor 1, *Arbor* did not focus only on whether the bills were sent at periodic monthly intervals, but focused on whether the bills were sent after the services were provided and specifically relied on *Missouri Growth* in holding that the utility fees were due after services were provided. *Id.* at 684. Indeed, this Court specifically rejected the notion – used by the Trial Court – that only timing and regularity of payment should be considered under Factor 1. *Id.* at 684, n.10.

Here, the Charge is paid after MSD's ongoing services are provided (i.e., in arrears and never in advance) in compliance with MSD's Ordinance, which is identical to the wastewater ordinance approved in *Missouri Growth* and cited in *Arbor*. But there

was much more undisputed evidence in the record proving that the Charge was billed after the provision of service. Key among this evidence is the unchallenged fact that, when a customer added or removed impervious area on a parcel of property, MSD would increase or decrease the amount of the Charge after the date of the change. (Tr.705:1-706:11.) In contrast, the Trial Court's analysis was legally deficient by incorrectly focusing only on timing and regularity and by creating out of whole cloth a new standard (whether the service can be accepted, rejected or limited) that is not found in *Arbor* or any other case (save for one outlier from the Court of Appeals, Western District).

Factor 2 – Who Pays the Fee? – For Factor 2, *Arbor* focused on whether the charge was blanket-billed to all residents and held that Factor 2 weighed in the city's favor because residents who received no services are not billed and those who received services are billed. *Id.* at 684.

The Stormwater User Charge is not blanket-billed; it is paid by only those, and all those, who receive stormwater services. Some 38,000 unimproved properties are not billed the Charge (akin to the 75,000 not billed in *Missouri Growth*), while non-profit and governmental entities (who did not pay ad valorem taxes) are now billed. The rationale for not charging for a property's pervious or undeveloped area is because it is the impervious area and the attendant increased runoff that drives the need and demand for stormwater services. In contrast, the Trial Court's tautology, reworked (but no less incorrect) by the Court of Appeals, ensures a finding of blanket-billing by considering only those customers who are subject to the Charge (instead of all residents) or by making presumptions about MSD's services that are not supported by any evidence in the

record. The Trial Court's other basis for finding Factor 2 against MSD was its remarkable, and utterly unsupported, conclusion that the Charge violated Factor 2 because MSD attempted to comply with Factor 2 by not billing 38,000 properties.

Factor 3 – Is the Amount of the Fee Paid Affected by the Level of Goods or Services Provided to the Fee Payer? – For Factor 3, *Arbor* did not focus on the particular services each customer received each month, but focused on whether the bill depended on the amount of services used and whether the utility charges were impermissible flat charges based on average use. *Id.* at 684-85.

Here, the individualized Charge paid by each MSD stormwater customer varies depending on the level of services provided (and is not a flat charge) in that the Charge is based on a measurement of each customer's impervious area. Impervious area is the best measure of MSD's stormwater services because these services are needed as a result of the additional runoff (above the natural state) created by development and impervious area. In contrast, the Trial Court misapplied the facts to the law by blindly accepting the strawman theory offered by Plaintiffs' experts (i.e., no relationship between *total* runoff and impervious area) that misconceives MSD's services and the basis for the Charge (i.e., the relationship between the additional runoff that drives the services and impervious area). The Trial Court compounded this error through its misconceptions over how utility rates must necessarily be developed and function and by focusing on the irrelevant consideration of how customers might benefit from the services.

Factor 4 – Is the Government Providing a Good or Service? – For Factor 4, this Court in *Arbor* found in the City's favor because there was no dispute that utility

services were being provided, and there was no discussion of any requirement that the service had to be new in order to meet this factor. *Id.* at 685.

As recognized by the Trial Court and Plaintiffs' own experts, MSD provides stormwater services, revenues from the Charge are used only to fund stormwater services (not for general revenue), and the Charge provided for new and better stormwater services. In contrast, the Trial Court's construction of a new standard without any basis in law (new service requirement) and its reliance on *Building Owners* and other improper considerations was legally deficient.

Factor 5 – Has the Activity Historically and Exclusively Been Provided by the Government? – For Factor 5, *Arbor* considered who historically provided the services generally (which was inconclusive), who historically provided the service in the city (which favored the city), and whether the city was currently the exclusive provider of services (which favored the plaintiff). *Id.* at 685-86.

Here, private individuals and entities provide the same or similar stormwater services as MSD, which warrants at worst a finding of inconclusive on Factor 5. But the Trial Court found in Plaintiffs' favor, without the benefit of *Arbor*, by erroneously finding that no other entities provided stormwater services for a charge or fee.

Other Considerations – In *Arbor*, this Court did not foreclose that other considerations could be relevant in the rare, close case where the balance of the *Keller* factors was inconclusive. *Id.* at 683. This is not a close case, so other factors need not be considered.

In any event, other factors such as deference to the rate-making of a municipal body and the existence of the Rate Commission should weigh in favor of the Charge not being a tax, while the Trial Court's "characteristics of a tax" and general benefits analysis have no place in this case.

As will be demonstrated herein, in contrast to the straightforward analysis set out in *Arbor*, the Trial Court (and in many instances the Court of Appeals) implied standards that are simply not found in the cases, created new *Keller* considerations out of non-germane statements made in cases like *Feese* and *Building Owners*, or applied considerations that have been expressly rejected by *Arbor*. The endgame is that the failure to adhere to this Court's approach, along with the approach of *Keller* and its progeny, resulted in the erroneous and unsupportable conclusion that the Stormwater User Charge violated the Hancock Amendment. Several misconceptions of the Trial Court and the Court of Appeals underscore their flawed analysis.

Judgment's Misconceptions

The Judgment was practically a verbatim acceptance of Plaintiffs' Proposed Findings of Facts, Conclusions of Law and Judgment. (*Compare* LF1447-1482 with LF1541-77). Indeed, the Trial Court authored only 11 of the 134 paragraphs in the Judgment. (J.¶¶24-27,34,41,45,52,72,80,108(LF1548 49,1551,1553,1555,1560,1562, 1568;A8-9,11,13,15,20,22,28).) This Court and others have cautioned against the practice of wholesale adoption of a parties' proposed judgment and labeled the practice "unwise," "of doubtful utility," and "troublesome." *See Massman Constr. Co. v. Mo.*

Highway & Transp. Comm'n, 914 S.W.2d 801,804 (Mo.banc 1996); *Nolte v. Wittmaier*, 977 S.W.2d 52,57-58 (Mo.App.E.D. 1998).

Here, the Trial Court did not make any credibility findings with respect to witnesses or evidence, but simply adopted the facts and conclusions of law proposed by Plaintiffs that may, at first blush, sound pertinent and arguably convincing, but, when these facts and conclusions are examined under the *Keller* framework and the reality facing MSD as a stormwater utility, they are shown to be completely irrelevant and immaterial to the *Keller* factors.

Foremost among these misconceptions is the Trial Court's and Court of Appeals' reliance on opinions proffered by Plaintiffs' experts about the lack of a direct relationship between impervious area and *total* runoff from a property. (Tr.248:23-249:18,278:25-279:10,501:14-505:16,597:10-14.) The underlying premise for these opinions was the interpretation of Factor 3 to require a one-to-one linear relationship between the impervious area and total runoff. (J. ¶61(A17.)) Legally, as described in Part I.C, *infra*, this is not what the third *Keller* factor requires, and it was error to apply such a standard.⁵ No Hancock case requires such a level of exactitude as required by the Trial Court and

⁵ In overruling an objection by MSD at trial to the one-to-one relationship developed by Plaintiffs' experts, the Trial Court recognized the questionable nature of this standard, when it stated: "I'm not saying that that's the standard. The Court of Appeals is going to grant that. With that in mind, the objection is overruled." (Tr.274:10-276:3.)

Plaintiffs' experts. Factually, there was overwhelming evidence that MSD focused on the increased runoff due to the addition of impervious area in developing the Charge and providing services; this is because the additional runoff above the natural state drives the demand for MSD's stormwater services and thus is the best measurement of the level of services provided to each individual customer. (*See, e.g.*, Defs.Exs.B at 3, App.I (A100,111-13), H at 79, 146; SedgwickDep.Desig.77:21-78:11(LF354-55); Pls.Ex. 75(Vol.I)160:14-161;4; Tr.669:23-670:8,708:11-21,754:11-755:18,756:1-19,765:7-766:6,772:13-20,835:8-13,863:8-864:18,894:11-895:5,1007:7-9,1037:5-24,1071:8-18.) Thus, accepting the opinions of two well-compensated experts over the evidence provided by the people who developed the Charge and must run the stormwater utility was a finding against the overwhelming weight of the evidence.

Other examples of misconceptions adopted by the Trial Court in its Judgment include:

- ¶¶40, 42-43 – The Stormwater User Charge does not vary month-to-month based on the amount of rainfall.
 - MSD's stormwater services encompass much more than just the use of the stormwater system, and the actual amount of stormwater that may flow through the system in a given month is irrelevant because the system must be operated and maintained year round and in all types of weather so that it

can properly function when large rain events occur.⁶ (Tr.705:22-706:11; SedgwickDep.Desig.223:13-226:21,229:8-25(LF1363-67.) Thus, the amount of rainfall in a given month does not affect MSD's system and costs because MSD's services are continuous and ongoing without regard to whether it rains 2 inches or 10 inches in a month. (Tr.375:24-376:8, 1030:18-1031:13.)

- ¶¶46-47 – The Stormwater User Charge is an apportionment of costs and is not based on the actual services provided to a customer in a given month.

- This is what utility rates are. All utilities' rates are based on a standard unit of measurement (e.g., kilowatt hour, cubic feet of water usage) that represents the unit cost to provide services in order to equitably distribute the total costs of providing all services. (Pls.Ex.80(Vol.I) at 145:11-24; Tr.170:21-171:1; HoelscherDep.Desig.(Vol.II) at 98:13-99:7(LF1278-79.) No utility can give the precise cost of providing a service (such as gas or electric) to a particular customer for a month. (Tr.396:23-397:17,767:8-25.) Electric rates do not vary based on the distance from the power plant

⁶ MSD's stormwater system is designed for 15- or 20-year design storms, meaning that the infrastructure is built and maintained to handle stormwater from rainfalls that occur only on average once every 15 or 20 years (i.e., large, infrequent storms). (Tr.1019:13-1022:4.) Indeed, a 20-year design storm equates to 4.8 inches of rain in an hour. (*Id.*; Def.Ex.EEE at 79.)

or the number of electric lines replaced after a storm. (Tr.574:23-575:22,788:3-789:4.) For stormwater services, impervious area is the industry standard unit of measurement because it is what causes the demand for stormwater services and it represents the increased runoff on a property. (Def.Ex.WW at 124; Tr.609:23-610:19,804:24-805:18,852:19-853:13,865:13-866:1.)

- ¶¶52, 89, 90 – Because some of MSD’s stormwater services provide a “general benefit” and because some customers “benefit” more than others, the Stormwater User Charge violates Hancock.

- Looking at the benefits received from stormwater services is the wrong approach for two reasons. First, the benefits received by a customer are irrelevant to the cost of providing the stormwater services. MSD must operate and maintain the stormwater system and provide its planning and regulatory services, and these services cost money. MSD, like other utilities, based its charge on what drives the level (and therefore the costs) of its stormwater services – impervious area. If Property A has more impervious area than Property B, Property A will have more additional runoff than Property B, and Property A increases the level of stormwater services required more than Property B does; thus, Property A would be expected to pay more. Second, an analysis of the benefit received by a customer is more apt when looking at ad valorem taxes, not user fees.

There is nothing in the Hancock Amendment or any case applying *Keller*

that prohibits a governmental entity from charging a user fee for services because the general public also benefits from the services. If this were the case, such services as sanitary sewers or trash removal could not be funded by user fees because those services provide a benefit to all residents due to health and safety “benefits.” This benefits analysis, as shown further herein, has no place in the application of the *Keller* factors.

**The Majority Opinion of the Court of Appeals Was Imbued
with Distaste of the *Keller* Factors and Even User Fees as a Whole**

The Court of Appeals’ majority opinion ignored, and is in conflict with, the analysis of the *Keller* factors in the decisions of this Court and the Court of Appeals. In *Arbor*, this Court firmly held that “the *Keller* factors provide useful and usually determinative criteria” and “assist the courts in determining the ultimate issue of whether the charge is a user fee or a disguised tax.” *Arbor*, 341 S.W.3d at 675,682. Yet, guided by Judge Holstein’s 1993 *Beatty II* concurrence, the majority opinion openly criticized the *Keller* factors: “*Keller* is fraught with difficulty because the factors developed in that opinion are so vague and manipulatable [sic] that they necessarily result in repetitive litigation and are ultimately unworkable. . . . Unfortunately, as Justice Holstein also recognized, the *Keller* analysis is the current state of the law and this Court is bound to abide by it.” (App.E.D.Op. at 3-4(A79-80) (citations omitted).) But, despite its protestation of grudging acceptance, the majority opinion did not abide by the *Keller* factors and, in place of this objective analysis, its anti-*Keller* and “just let the voters decide” rhetoric guided the opinion.

This is most keenly demonstrated by the majority opinion’s analysis of Factor 1, which begins with a statement that “[t]his first factor perfectly illustrates Justice Holstein’s criticism of *Keller*. The cases analyzing this factor lack uniformity and are all over the board.” (App.E.D.Op. at 4(A80).) Yet the only case cited to show the purported lack of uniformity is the *Building Owners* case from the Western District, which the majority opinion cited for the proposition that the Western District focused only on the regularity of payment. (App.E.D.Op. at 4(A80).) However, in *Arbor*, this Court held that this very analysis used in *Building Owners* was wrong, and the Supreme Court has reinforced the proper analysis of Factor 1, which includes both the regularity of payment and whether the bill is sent on or after services are provided. *Arbor*, 341 S.W.3d at 684. In so holding, *Arbor* in effect overruled cases like *Building Owners* that considered only the regularity of payment. Based on the mistaken premise that Factor 1 is unworkable, the majority opinion goes on to fashion its own, novel Factor 1 analysis, overlooking the holding of *Arbor*.

The majority opinion further demonstrated its unwillingness to follow *Keller* when it ultimately advised: “If this change in fee structure is as vital as MSD claims it is, MSD should take its case to the voters, not to the courts.” (App.E.D.Op. at 12(A88).)⁷ In

⁷ The majority opinion’s haphazard approach is exemplified by its citation to the wrong provision of the Missouri Constitution (art. X, §11(c), which is not part of the Hancock Amendment) as the applicable Hancock provision. (App.E.D.Op. at 2,n.2 (A78).)

essence, with this statement, the majority opinion is saying that courts should abdicate their roles in deciding Hancock cases under the *Keller* factors because MSD should take all changes in user charges to the voters. This is clearly in conflict with *Arbor*, *Keller*, *Missouri Growth*, and other cases. Moreover, it overlooks the fact that MSD has a voter-approved Rate Commission that examines all aspects of new rates and fees. Finally, it overlooks the fact that MSD did not bring this case, Plaintiffs did.

When the correct *Keller* analysis is applied objectively as it was in *Arbor*, there is no doubt that the Stormwater User Charge is not a tax under the Hancock Amendment.

A. THE STORMWATER USER CHARGE WAS DUE AFTER THE STORMWATER SERVICES WERE PROVIDED, AND MSD'S STORMWATER SERVICES ARE CONTINUOUS AND ONGOING, THEREBY COMPLYING WITH FACTOR 1.

The first *Keller* factor inquires:

When is the fee paid? – Fees subject to the Hancock Amendment are likely due to be paid on a periodic basis while fees not subject to the Hancock Amendment are likely due to be paid only on or after provision of a good or service to the individual paying the fee.

Keller, 820 S.W.2d at 304 n.10. This factor is intended to distinguish a user fee paid on or after the time the service is provided from a tax, which is paid without regard to when the service is provided. For example, a municipality's *ad valorem* property tax is typically paid once a year, by December 31, which will be used to pay for all municipal services provided over the coming year.

In *Missouri Growth Association v. Metropolitan St. Louis Sewer District*, 941 S.W.2d 615 (Mo.App.E.D. 1997), the Court of Appeals held that the first *Keller* factor was resolved in MSD's favor because, "[a]lthough this [Wastewater User Charge] is billed periodically, payment is due 'only on or after provision of a good or service,' making it more like a user fee than a tax." *Id.* at 623. This finding was based solely on the wording of MSD's wastewater ordinance. *Id.* In *Arbor*, this Court resolved the first factor in the city utility's favor on the basis that, although the utility fees were "paid at periodic monthly intervals," the fees were like the wastewater charge upheld in *Missouri Growth* because the bills were "sent out only for service that already has been provided by the time the bill is sent." 341 S.W.3d at 684.

The Trial Court erroneously declared and applied the law in its analysis of Factor 1, which by itself warrants reversal of its decision on this factor. First, the Trial Court misinterpreted the first *Keller* factor to be primarily concerned with only the timing and regularity of the payment of the fee and, thus, did not reach any conclusion of law regarding whether the Stormwater User Charge was paid before or after MSD provided services. (J. ¶¶101-103(LF1567; A27).) In so doing, the Trial Court relied on language from *Beatty II* regarding the focus of Factor 1 being on the timing and regularity of the bill. 820 S.W.2d at 220. However, this consideration of only timing and regularity was squarely rejected by this Court in *Arbor*, which re-affirmed that a court must consider whether the fee was paid after the service was provided. 341 S.W.3d at 684 n.10. *Arbor* clarified: "While *Beatty* stated that the first factor concerns itself 'only with timing,' it did not indicate an intent to change the first *Keller* factor, which requires that in

determining timing a court consider both whether the fee is paid on a periodic basis and whether it is paid only after provision of a service.” *Id.* Therefore, the Trial Court’s consideration of only timing and regularity, while ignoring whether the Stormwater User Charge was paid after service, was a clear misstatement and misapplication of the settled law on Factor 1.

The Court of Appeals fared no better with respect to its analysis of Factor 1. As noted above, the majority opinion threw up its hands and, without any basis in the law, declared that Factor 1 was impossible to apply because of the purported divergence of the cases on this factor. (App.E.D.Op. at 4(A80).) Yet there is no divergence once the legally deficient analysis of *Building Owners* is taken out of the equation. Moreover, while the Court of Appeals correctly stated that the Trial Court should have considered whether MSD billed its Stormwater User Charge after the services were provided, it found that MSD did not produce any evidence relating to this consideration other than the language of its Ordinance. This finding is baseless and is directly contrary to the evidence in the record establishing that the Charge was billed after service, which both courts below conveniently ignored in order to find Factor 1 against MSD.

1. The Courts Below Ignored the Fact That the Stormwater User Charge Was Billed to Customers After Services Were Provided, and There Was No Evidence to the Contrary.

At trial, it was not disputed that the Stormwater User Charge was modeled on the wastewater user charge upheld in *Missouri Growth*. (Tr.675:4-9,680:16-681:12.) Nor was it disputed that the language of the respective Stormwater and Wastewater

Ordinances relating to billing the charge is identical and that they require billing the charge *after* the provision of the services. (Tr.681:18-682:15; *compare* Def.Ex.B §12(A105-06) *with* Def.Ex.G §6.) Likewise, there was no dispute that, pursuant to Ordinance 12560, the first bills for the Stormwater User Charge were sent to customers in April 2008 for stormwater services provided in March 2008, and each month thereafter for services provided in the previous month. (Tr.859:14-860:4,970:1-5.) MSD never billed in advance; it always billed in arrears. (Tr.705:1-21.) Therefore, just as in *Missouri Growth* and *Arbor*, payment of the Stormwater User Charge is due only on or after the provision of stormwater services.

But the evidence at trial went much further than merely reciting the Ordinance. The Trial Court and the Court of Appeals overlooked the abundant record evidence that demonstrates that the Charge was billed only after services were provided. For example, MSD Executive Director, Jeff Theerman, not only testified that the Stormwater User Charge went into effect in March 2008, with bills being sent out in April 2008 for the prior month, but unequivocally testified:

Q. And do you have any other basis for saying that the Stormwater User Fees are paid only on or after the provision of stormwater services?

A. Well, when an area is developed, an impervious area is added. There's a lag between when that area gets added and we actually start charging. Typically, it occurs when the aerial photograph information is updated. *So development occurs, infrastructure is put in place, and then service starts; and then the billing for that service happens later.*

(Tr.705:1-706:11(emphasis added).) And the testimony of MSD’s expert, Steve Sedgwick, MSD’s Director of Finance, Jan Zimmerman, and the Ordinance itself further confirm that the Charge was due after the stormwater services were provided in the prior month, that the amount of the Charge would change after the impervious area (and thus the level of service) was increased or decreased, and that the services were provided to customers in an ongoing and continuous manner. (Tr.859:14-860:4,970:1-5; Def.Ex.B. §§11,12,22(A105-06,108).) These key, undisputed facts were completely overlooked by the Trial Court and the Court of Appeals in their Factor 1 analysis.

Indeed, in its majority opinion, the Court of Appeals found against MSD on Factor 1 due to its mistaken and wholly unsupported belief that MSD relied only on the Ordinance as evidence of the bills being sent after services were provided. (App.E.D.Op. at 6(A82).) And this error is all the more clear because Plaintiffs utterly failed to meet their burden of proof by presenting no evidence on this point at all; instead choosing to manufacture novel legal standards unmoored from the *Keller* analysis.

When the evidence and the law detailed above is properly taken into account, the unavoidable conclusion is that Factor 1 should have been resolved in MSD’s favor by the courts below.

2. A Periodic Fee for Continuous and Ongoing Services Meets

Factor 1.

The Court of Appeals, Eastern District has held that a periodic fee was not subject to the Hancock Amendment when the service “is an ongoing service that continues every year.” *In re Tri-County Levee Dist.*, 42 S.W.3d 779,786 (Mo.App.E.D. 2001), *rev’d on*

other grounds by Riverside-Quindaro Bend Levee Dist. v. Intercont'l Eng'g Mfg. Corp., 121 S.W.3d 531 (Mo.banc 2003). Here, all agreed that MSD's stormwater services are ongoing and continuous in nature. Professor Debo testified that MSD had a system in place with the capacity to handle large storms and that MSD's services were continuous in nature. (Tr.375:25-376:8.) Mr. Theerman testified at trial:

[S]tormwater services are continuous in nature because stormwater services with respect to the infrastructure are really demand services. They are services that are always turned on. Today is a nice sunny day. The stormwater system is not in use. Tomorrow it's going to rain and when it does, that system is there available to transport stormwater. So the idea that we're charging for the rain or we're charging for rain events is faulty. We're charging because there's an infrastructure in place that is available to take rain water whenever it's necessary for it to take rain water.

(Tr.704:6-10,705:22-706:11). And Director of Engineering Hoelscher likewise testified:

MSD's responsibility is to maintain and operate the stormwater system as well as the planning and regulatory functions. Those costs and those services are not affected by how much it rains in a given day, month or year. . . . We don't actually have any costs associated with the actual amount of runoff that may occur on a given time period.

(Tr.1030:18-1031:13.) Thus, the only evidence at trial was that MSD's stormwater services are services that are continuous and ongoing in nature because the infrastructure is always in place and ready to handle stormwater and because MSD operates and

maintains the stormwater system and performs regulatory and stormwater management services regardless of the weather (i.e., the level of services is essentially the same each month).⁸ Therefore, because MSD's stormwater services are ongoing and continuous, akin to a levee system, MSD prevails on the first *Keller* factor for this additional reason. *In re Tri-County Levee Dist.*, 42 S.W.3d at 786.

3. The Trial Court's Judgment on Factor 1 Contains Other Misstatements and Misapplications of the Law, Which Further Demonstrate the Deficiencies of its Factor 1 Analysis.

The Trial Court considered other elements regarding Factor 1, which, beyond being improper and outside the scope of Factor 1 as defined by *Arbor*, reinforce the failings of the Trial Court's (and Plaintiffs') Factor 1 analysis, including: that MSD apportions the total annual costs of its stormwater services, that the Stormwater User

⁸ In attempting to avoid its holding in *Tri-County*, the Court of Appeals found that "permanency of infrastructure" was not a valid consideration, reasoning that *Beatty II* was decided against MSD even though a permanent wastewater infrastructure was in place. (App.E.D.Op. at 6-7(A82-83).) This infrastructure analogy is inapt because that was not the reason MSD lost Factor 1 in *Beatty II*. Rather, Factor 1 was not met by MSD in *Beatty II* because the *ordinance* required quarterly bills to be sent out on a rolling basis without regard to when services were provided, which resulted in about half of the bills being sent out in advance of the services being provided. Infrastructure simply had nothing to do with this Court's decision. *See Beatty II*, 867 S.W.2d at 220.

Charge is not based on actual services provided to a customer in a month, and that MSD does not identify the amount of services provided to a customer each month. (J. ¶¶44-50(LF1553-54;A13-14).) Specifically, the Trial Court (and the Court of Appeals) made much of the fact that “MSD does not identify on their bills what specific stormwater services (or amount of services) it provided to [a customer] in the prior month.” (J. ¶¶44-45;(LF1553;A13).) This finding reinforces that the Trial Court and Plaintiffs impermissibly considered Factor 3 considerations in Factor 1 and failed to grasp what it is that utility rates do. Neither *Arbor* nor any other utility case from *Beatty II* to *Missouri Growth* to *Mullenix* require the utility to identify the specific services provided to a customer in each month. Rather, utilities determine the cost of providing the services and then set a rate based on a measure of service that can be applied fairly to each customer, which is what MSD has done here. The Trial Court’s Judgment is contrary to all these prior cases and cannot be allowed to stand.

Arbor, *Mullenix* and *Missouri Growth* must be properly analyzed by this Court in Factor 1. In those cases, Factor 1 was found in favor of the utilities not because the utilities used a meter; it was because the utilities charged customers for services provided in the prior month based on a generally-accepted measurement of service, such as the amount of water used for wastewater in *Mullenix* and *Missouri Growth*. In contrast, in *Beatty II*, MSD charged customers a quarterly flat charge based on average use without regard to when the services were performed, resulting in about half the bills being sent before the services were provided. 867 S.W.2d at 220.

Here, MSD *does* measure each property's impervious area, which is the relevant measure of stormwater services, and that is the industry standard used by stormwater utilities across the country. (Def.Ex.WW at 119,121,124; Tr.609:7-610:19,832:4-14.) Like a meter would measure a change in water usage for a wastewater charge, if the impervious area on a piece of property is increased or reduced, MSD's measurement will change, and the Stormwater User Charge likewise will be increased or reduced because of the change in the level of service. MSD does not have a meter to measure rain or actual runoff each month because, as previously explained, metering runoff is irrelevant to the level of services provided. The stormwater services remain essentially constant regardless of the amount of rainfall or actual runoff from a property in a given month. (Tr.375:24-376:8,1030:18-1031:13.) Therefore, it is not the existence of a meter that allows a charge to meet Factor 1, but the use of a principled, generally-accepted measurement of service like the kilowatt hour, cubic feet of water, or square feet of impervious area.

Yet another misstatement of the law by the Trial Court was the attachment of an additional element to the first *Keller* factor – that the service can be accepted, rejected or used on a limited basis. (J. ¶¶40,103(LF1552,1567;A12,27)). There simply is no mention of this consideration in *Arbor*, which is not surprising because the ability to reject or limit a service has nothing to do with the factor – “*When is the fee paid?*” Indeed, these considerations are irrelevant to or misconceive the services provided by MSD and how utilities like MSD charge, and, if relevant at all, this contention should be considered in the third *Keller* factor. The Trial Court confused the factors here and

elsewhere by allowing Factor 3 considerations to leak into other factors. *See Ashworth v. City of Moberly*, 53 S.W.3d 564,576 (Mo.App.W.D. 2001) (holding party confused the *Keller* factors). Indeed, the Court of Appeals correctly held that such considerations had no place in the Factor 1 analysis. (App.E.D.Op. at 5(A81).)

Nevertheless, in support of this faulty analysis, the Trial Court relied on *Building Owners & Managers Ass'n v. City of Kansas City*, 231 S.W.3d 208,212 (Mo.App.W.D. 2007), which is the only case to apply this “accept, reject, or use on a limited basis” standard. However, a plain reading of *Building Owners* demonstrates it is not in point for several reasons with respect to Factor 1 (or any factor for that matter).

First, like the Trial Court here, the *Building Owners* court mistakenly focused only on the regularity of the bill and failed to consider whether the bill was sent after the provision of the service, *id.* at 212, which is directly in conflict with *Arbor’s* holding that regularity of payment cannot be considered alone. *Building Owners* is clearly an outlier at odds with the other cases analyzing Factor 1.

Second, *Building Owners* misconstrued the facts of *Missouri Growth* in stating that the wastewater services were not billed on a regular or periodic basis because the monthly charge was based on water usage and if no water was used, then no fee was due. *Id.* In fact, MSD’s wastewater user charge upheld in *Missouri Growth* was based on an *annual* winter water meter reading, and the charge for the coming year remained the same, but was billed in arrears after services were provided. 941 S.W.2d at 618. Therefore, while it was certainly possible that water usage could vary from the winter

reading, the monthly bill would not change until the next annual meter reading (although the customer could apply for an adjustment for changed circumstances).

Third, the facts in *Building Owners* are clearly different from the facts here. In *Building Owners*, the annual fee was specifically created to generate more revenues for the fire department by direction of the City. 231 S.W.3d at 210,214. The purpose of the fire inspections was code enforcement, not services to customers.

Therefore, for these reasons, the Trial Court erred in finding *Keller* Factor 1 in favor of Plaintiffs where the settled law and undisputed evidence demonstrates that this factor should be found in MSD's favor.

B. THE STORMWATER USER CHARGE WAS CHARGED TO ALL THOSE AND ONLY THOSE RECEIVING STORMWATER SERVICES, INCLUDING TAX-EXEMPT ENTITIES, AND WAS NOT BLANKET-BILLED, THEREBY COMPLYING WITH FACTOR 2.

The second *Keller* factor asks:

Who pays the fee? – A fee subject to the Hancock Amendment is likely to be blanket-billed to all or almost all of the residents of the political subdivision while a fee not subject to the Hancock Amendment is likely to be charged only to those who actually use the good or service for which the fee is charged.

Keller, 820 S.W.2d at 304 n.10. This factor is intended to distinguish a user charge, which is paid only by those who use the service, from a tax, which is paid

generally by all. For example, a resident pays a school district's *ad valorem* property tax notwithstanding that the resident does not have a child attending the public school.

In MSD's wastewater cases, MSD prevailed on Factor 2 because, even though "almost all" MSD residents received a wastewater bill, there were approximately 75,000 properties that did not use MSD's wastewater services because they had septic tanks, had their water turned off, and other reasons. *See Missouri Growth*, 941 S.W.2d at 623. In *Beatty II*, this Court found Factor 2 in MSD's favor and held: "While it is true that almost all residents of the district pay the charge, it is also true that only those persons who actually use MSD's services pay the charge." 867 S.W.2d at 220. Similarly, in *Missouri Growth*, the Court of Appeals, whose opinion was directed to be reinstated by this Court, found this factor in MSD's favor because "only those individuals who actually use MSD's [wastewater] services pay the charge." *Missouri Growth*, 941 S.W.2d at 623.

Moreover, in *Arbor*, this Court recently reaffirmed this application of the second factor by holding:

Here, the evidence is that those few residents not receiving any services to their properties do not pay any utility fees, that only those who receive natural gas service are charged for it, that only those who receive electric service are charged for it, and so forth. Although most residents receive most of these services and so most residents pay these fees, *Beatty* held that this is the natural result of the fact that most residents receive the provided service and militates in favor of the municipality.

Arbor, 341 S.W.3d at 684(citation omitted). In contrast, in *Feese v. City of Lake Ozark*, 893 S.W.2d 810 (Mo.banc 1995), this Court held Factor 2 against the city because the sewer charge was imposed on properties not connected to the sewer and therefore received no services. *Id.* at 813.

Furthermore, in *Larson v. City of Sullivan*, 92 S.W.3d 128 (Mo.App.E.D. 2002), a sewer connection fee of \$3,750 or \$4,250 was in issue, and the court found Factor 2 in favor of the city because vacant lots were not charged the fee and only those properties using the system were charged. *Id.* at 132. And, in *Mullenix*, the court found Factor 2 in the city's favor on its sewer and water charge because "[n]o evidence was presented that the City blanket-billed all or almost all of the residents of the City." 983 S.W.2d at 562.

1. The Only Evidence at Trial Demonstrated that the Stormwater User Charge Falls Squarely Within These Controlling Cases.

As previously stated, the need for stormwater services is caused by the additional runoff caused by impervious area over the amount of runoff that existed naturally before development. Accordingly, the Stormwater User Charge is paid by those persons whose properties contribute additional runoff, and *not* by properties that do not so contribute. Therefore, if a property is undeveloped, it pays no Charge. If a property is developed, it pays the full charge based on its impervious area. If a property drains internally or to a river, it pays half of the Charge because it is not using the stormwater system (half of MSD's services). There is simply no credible argument that the Stormwater User Charge does not fall squarely within the cases discussed. At trial, the facts were undisputed that MSD did not blanket-bill the Stormwater User Charge. Some 38,000 undeveloped

properties without impervious area were not billed, and there was no evidence to contest this salient fact. (Tr.706:12-707:3,1049:22-1051:7; Def.Ex.UU.) Indeed, no customer was charged for their pervious or undeveloped land; only owners of property with impervious area are billed for stormwater services. (Tr.599:19-25,860:5-861:3; Def.Exs. B,C,D,E §12.) This is because development (such as adding concrete and roofs) causes the demand for MSD's services, whereas undeveloped land represents the natural state before development that drained naturally, and the natural state did not require (or cause the need for) a stormwater system or regulatory and planning services. (Tr.669:10-670:8, 709:10-713:25,775:12-21,835:14-22,840:13-841:12,873:14-874:9,1050:1-12.) This concept was best summarized by the uncontested testimony of Jeff Theerman:

Q. Don't undeveloped areas have runoff within the MSD District?

A. Absolutely. They have runoff.

Q. And why are undeveloped areas not charged for stormwater services?

A. The premise of our rate structure is that an undeveloped area doesn't typically have a stormwater system. It's a natural situation taken sort of in the gross, the area, were it not developed would not require a storm sewer system. Storm sewer systems are typically installed when development occurs; and so until development occurs and storm sewer infrastructure is installed and you are creating greater impacts on the receiving streams, no charge was made.

Q. (By Mr. Gianoulakis) And doesn't runoff from unimproved or undeveloped land go into the system?

A. Yes, it does.

Q. Why not charge for it?

A. Well, as what's been testified, natural ground certainly has runoff but until there's development, there isn't [need] for the infrastructure that serves the incremental increase in runoff that comes from that development. *So we don't charge for raw undeveloped land. There is a base level of runoff if you will that's naturally occurring and were there no urbanized area, there wouldn't be any infrastructure.* You would have a natural situation like [in] out-state Missouri where water runs off the land and enters creeks and doesn't have the impacts that come from an urbanized area.

Q. What is it that drives the need for your stormwater system?

A. *It's the development of the region that's driven the majority of the need and now, of course, the need is there because the stormwater system is there; and so there has to be the operations, maintenance and upkeep of that system.*

(Tr.669:10-22,709:10-710:8(emphases added).)

Equally important is that *all* who receive stormwater services pay the charge. Here, non-profit, governmental, and tax-exempt property owners, which represent a large amount of impervious area in MSD, *do* pay the Stormwater User Charge because they

create the demand for MSD's stormwater services just like anyone else with impervious area. (Def.Exs.H,TT; Tr.723:10-724:7,860:2-25,1047:19-1049:17.) In fact, the inequity of the previous (and, once again, current) revenue system is that a large tax-exempt property with abundant impervious area like a large hospital or university campus is charged less (\$0.24 per month) than a small residence because the hospital or university does not pay ad valorem taxes. (Pls.Ex.79 at 169:13-170:8; J. ¶21(LF1547;A7); Tr.626:15-23,958:13-959:3.) Therefore, the second *Keller* factor should be decided in MSD's favor because the Stormwater User Charge is not blanket-billed and is paid only by those, and by all of those, who cause the need for and receive the services.

No one – whether the Trial Court, Court of Appeals, or Plaintiffs⁹ – has ever provided a legally sound and cohesive reason as to why MSD's approach of not charging 38,000 undeveloped properties and charging all developed properties (including non-profit and governmental properties) violates Factor 2. Instead, the Trial Court, Court of Appeals, and Plaintiffs have engaged in mental gymnastics, unfettered by the law or the facts, to create new and improper standards under Factor 2 so that it could be found against MSD. This Court should not do likewise.

⁹ Indeed, Plaintiffs have never addressed the argument that not charging the 38,000 undeveloped properties results in this factor being found in MSD's favor. (LF1491-93; Cl.Arg.Tr.51). Instead, the Trial Court and Court of Appeals took it upon themselves to fashion new standards under Factor 2 so MSD did not prevail on this factor.

2. The Trial Court and Court of Appeals Misinterpreted the Law in Their Factor 2 Analysis by Using a “Benefits” Rather Than a “Demand” Analysis.

The Trial Court emphasized the fact that some property owners benefited from stormwater services, but did not pay the Stormwater User Charge. (J. ¶52(LF1555; A15).) Similarly, the Court of Appeals’ majority opinion’s Factor 2 analysis is premised on the assumption that undeveloped properties receive the “benefit” of MSD’s planning and regulatory services and therefore should be charged for those services. (App.E.D.Op. at 7(A83).) Yet whether a resident “benefits” from a certain service has not been considered in Factor 2 by the Courts in *Keller*, *Arbor*, *Mullenix*, *Missouri Growth* or in any other Hancock case. As shown herein, it was legally improper for the courts below to consider this concept of benefits.

With respect to the undeveloped properties, the Trial Court made a factual finding that: “Landowner’s [sic], with no impervious area pay nothing, though presumably they would benefit by Defendant’s services, at least equivalent to 50% benefit, as do the properties that drain internally, directly into rivers, etc.” (J. ¶52(LF1555;A15).) By its own wording, this “finding of fact” is a presumption that is not supported by a citation to evidence in the trial record (because there is none) and was made in error. Again, as detailed above, pervious area is not charged because it does not cause the need for any stormwater services.

The Trial Court’s legal analysis proved no better by mistakenly relying on *Feese v. City of Lake Ozark*, 893 S.W.2d 810 (Mo.banc 1995), for the proposition that MSD does

not meet Factor 2 because customers whose properties do not drain into the stormwater system (i.e., those on major rivers or internally drained) are still assessed the Charge. (J. ¶¶51-52,106-09(LF1554-55,1568;A14-15,28).) This overly simplistic analogy to the “unconnected” properties in *Feese* does not withstand scrutiny. In *Feese*, the properties were not connected to the sewage system (i.e., had septic tanks) and thus received no wastewater services, but were still charged the same as those who were connected and received services. 893 S.W.2d at 813. This Court held that this charge was worse than the charge in *Beatty II* (where MSD did not charge septic tank properties) because of this fact and found it was a tax. *Id.* However, the “unconnected” customers in *Feese* bear no relation to MSD’s customers that receive credits here.

Unlike the other 99.9% of MSD customers (only 600 of 480,000 receive the 50% credit), these customers’ stormwater does not drain through the stormwater system, and so (unlike the “unconnected” properties in *Feese*) they are *not charged* the portion of the Stormwater User Charge relating to use of the stormwater system. (Tr.782:21-783:12, 866:11-868:1,1040:11-14.) But these customers still contribute to the need for regulatory and planning services, and they accordingly are charged only for that 50% portion of the Charge. (Tr.595:19-23,1041:1-24.) Simply stated, customers who do not drain into the stormwater system are charged for the amount of services they have caused by their development like all other MSD customers, unlike the properties in *Feese* that were billed, but received nothing.

The Court of Appeals’ majority opinion appears to have reworked the Trial Court’s faulty conclusions by substituting its own analysis, which again is not anchored

in any fact. The opinion held either: that the 600 people whose land does not drain into MSD's system should not be charged at all because they do not use the stormwater services; or that all residents (including undeveloped parcels) should be charged if the Charge is for stormwater and "ancillary" services. (App.E.D.Op. at 7(A83).)

But this holding is belied by the undisputed facts in the record. There was no dispute between the parties that stormwater services are not just limited to operation and maintenance of the stormwater system, but include regulatory and planning services. (Tr.594:3-20,715:14.) The "ancillary" services concept put forth in the majority opinion has no basis in fact and is, indeed, belied by the facts.

Moreover, the 600 directly-drained customers *do not pay* for the use of the stormwater system; they only pay for the regulatory and planning services that are caused by their impervious area. (Tr.1040:11-1041:13.) The majority opinion ignored the fact that these customers received a 50% credit (for not using the stormwater system). A simple table best illustrates these classes of customers:

Property Type	Amount Charged	Why?
Undeveloped	0%	No additional runoff
Developed	100%	Additional runoff
Drain internally or to rivers	50%	Additional runoff does not enter stormwater system so property not charged for that service

Likewise, the majority opinion overlooked the fact that the undeveloped properties are not charged because they do not cause the demand for any of the stormwater services (including “ancillary services”) because they have not developed their property. (Tr.706:12-707:3,835:14-22,840:13-841:12,1049:22-1051:7.) Only the developed properties (and all the developed properties) were subject to the Charge because development and impervious area cause the need for the services. (Def.Ex.WW at 121 (“So, it only makes sense to pay for stormwater on the same basis – the more you pave, the more you pay. All citizens can intuitively grasp this concept, and the vast majority feels it is fair.”); Tr.709:10-713:25,840:12-841:12,1050:1-12.) This is how a user charge works.

Furthermore, a key point in *Keller* was that a public entity could choose to levy a tax or assess a user charge in order to fund services and that it was constitutional for a public entity to shift the burden of paying for services to the private users as opposed to the general populace. 820 S.W.2d at 304. But a public entity can justify funding the services by either means – through a benefit to the community (tax) or charging those who received the services (user charge). However, when a public entity changes from a tax to a user charge, the benefit to the community does not disappear merely because the service is now being funded by a user charge. Whether a resident receives a “benefit” is a concept related to ad valorem taxes, *see e.g., Feese*, 893 S.W.2d at 813, and has no place in an analysis of a user charge under the Hancock Amendment. The two concepts must remain separate and distinct or else the outcome is determined and the *Keller* analysis is rendered meaningless. Indeed, the Trial Court committed a similar error to the

majority opinion's when it supplanted the *Keller* analysis with its "All of the Characteristics of a Tax" analysis focusing primarily on the general benefit that stormwater services might have. (J. ¶¶89-93(A24-25).)

An example illustrates the misplaced reliance of the courts below on "benefits." Take public parks. They certainly benefit the residents of the community through increased property value, green space, and other means. And a city, county or state can certainly fund public parks through general revenue and ad valorem taxes, which would be justified because of these benefits. However, nothing prevents the public entity from deciding that it instead wants to fund public parks through admission fees charged to the actual users of the parks. Non-using property owners still have the same benefit as before, but they are not being charged. The key point is that, even though these non-users still derive some "benefit" from the parks, the user charge is nevertheless valid.

The same holds true here. Stormwater services, including the planning and regulatory services, certainly "benefit" all residents by providing, for example, flood protection and monitoring of water quality. Accordingly, MSD would be justified in funding stormwater services through taxes on all residents. But this benefit does not preclude MSD from instead implementing a user charge and funding the services by charging only the property owners that cause the very need for these services through the development of their land. *Keller* teaches that Hancock allows MSD to replace taxes with a fair and equitable user charge billed to property owners with impervious area, including non-profit, church and governmental entities. And the fact that non-users

(undeveloped property owners) may still “benefit” in this more general, tax sense does not change the validity of the user charge.

If, indeed, the law was that any service with a general benefit would fail to meet Factor 2 because residents who received some kind of ancillary benefit were not charged, then several well-settled cases were wrongly decided. For instance, all residents “benefit” from having a properly-functioning wastewater system due to environmental and health considerations, but *Mullenix*, *Missouri Growth* and *Beatty II* still met Factor 2 despite not charging undeveloped parcels or those on septic tanks. The same holds true for *Larson*, where only those residents who connected to the wastewater sewers paid for the sewers, and the sewer system itself was the good or service. *Larson*, 92 S.W.3d at 133. Indeed, this Court in *Beatty II* recognized that wastewater regulatory and planning services were provided by MSD and revenue was necessary to provide them. 867 S.W.2d at 218. These rulings are logical because, by the very nature of some services, there is benefit, but this does not preclude a user charge from being instituted.

3. The Central Premise of the Trial Court’s Ruling on Factor 2, That MSD Did Not Charge the 38,000 Customers in Order to Meet Factor 2, Is Unsupported in Fact and in Law.

The centerpiece of the Trial Court’s Factor 2 analysis was its conclusion that MSD did not charge properties without impervious area because it “*seems* only related to an attempt to comply with the Keller factors, by not billing everyone.” (J. ¶108(LF1568; A28)(emphasis added); J ¶27(LF1549;A9).) Putting aside how any definitive factual or legal finding could begin with the word “seems,” there was no evidence, let alone

substantial evidence, in the record to support this remarkable and speculative conclusion by the Trial Court.

In adopting the Stormwater User Charge, MSD naturally had to comply with the Hancock Amendment. (Def.Ex.H at 62-87; Pls.Ex.22 §7.270.) In effect, the Trial Court stated that the Charge violated the Hancock Amendment because MSD complied with the Hancock Amendment. As detailed above, MSD did not charge these 38,000 properties because undeveloped properties (as well as undeveloped parts of properties) do not contribute the increased runoff that causes the need for MSD's stormwater services. (Tr.706:12-707:3,835:14-22,840:13-841:12,1049:22-1051:7.) There was no evidence that MSD decided not to charge these properties merely as a subterfuge to meet the second *Keller* factor. The Trial Court's analysis placed MSD in a no-win situation because, if MSD billed these 38,000 properties, Plaintiffs understandably would have argued that MSD did blanket bill in violation of Factor 2.

Moreover, the finding defies common sense. If MSD (or any political subdivision) decides to adopt a user charge and wants that charge to be legal, the charge must comply with Hancock and meet the *Keller* factors. Doing so is a *positive* consideration, not a negative one. The development of the user charge would necessarily involve determining who receives services and who will be charged. In not charging these 38,000 customers, this is precisely what MSD did. (Def.Ex.B at 3,5(A100,102); Tr.706:12-707:3,1049:22-1051:7.) The Stormwater User Charge was based on impervious area because impervious area and development relate to MSD's services (i.e., the additional runoff from development causes the demand for services), and therefore

those properties without impervious area were not assessed the Charge. (Tr.840:13-841:12,1049:22-1051:7.)

Finally, neither the Trial Court nor the plaintiffs have ever pointed to any case which examines the motivation for how a user charge has been developed – because there is no such case. The previous cases applying *Keller* have focused on the objective criteria set forth in the five factors and decided whether or not the charge met them; they have not resorted to idle speculation about why a certain aspect of the charge might have been included.

Equally deficient was the standard concocted by the Trial Court and Plaintiffs, which ignored the basic test of Factor 2 (whether all or almost all *residents* pay), and instead considered only customers that have impervious area in determining whether the Charge is blanket-billed: “MSD charges its Stormwater User Charge to every resident owning property in the District with impervious area.” (J. ¶51(LF1554;A14).) Of course, because the only customers that are billed are those with impervious area, the obvious conclusion of the Trial Court was that it was blanket-billed. This self-fulfilling and circular reasoning ignores the caselaw because, if the court only considered the people who received the user fee bills in deciding if there was blanket-billing, Factor 2 would be completely meaningless. There would always be blanket-billing

Once the Trial Court’s strained analysis of Factor 2 is set aside, there remains a straightforward analysis mandated by *Arbor* that is fully supported by the record: while a lot of MSD’s residents pay the Charge, it is not blanket-billed because undeveloped

properties that do not cause the need for services do not pay, and only the customers (and all the customers) that cause the need for MSD's services pay for those services.

C. THE STORMWATER USER CHARGE IS A VARIABLE RATE, INDIVIDUALIZED CHARGE BASED ON THE LEVEL OF SERVICE TO EACH CUSTOMER, THEREFORE COMPLYING WITH FACTOR 3.

The third *Keller* factor looks at how the amount of the Stormwater User Charge is calculated:

Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer? – Fees subject to the Hancock Amendment are less likely to be dependent on the level of goods or services provided to the fee payer while fees not subject to the Hancock Amendment are likely to be dependent on the level of goods or services provided to the fee payer.

Keller, 820 S.W.2d at 304 n.10. This factor is intended to distinguish a user fee, which varies for each customer dependent on the services provided to them, from a tax, which is not dependent on the level of services provided. For example, a resident pays a school district's *ad valorem* property tax based on the value of his or her property, not based on the number of children, if any, attending the public schools.

Synthesis of *Keller* Factor 3 Utility Cases

Beatty II held that “the charge imposed must bear a *direct* relationship to the level of services a ‘fee payer’ actually receives.” 867 S.W.2d at 221. There, this Court found that MSD's then wastewater charge did not meet the Factor 3 test because it was a *uniform flat rate* charge for all residential customers based on the average water usage for

all residential customers. *Id.* Non-residential customers' charges, in contrast, were based on individual water usage. This Court distinguished between the uniform flat rate, average residential charges and the variable, individualized non-residential charges by stating that there was no "direct relationship" between the uniform flat rate charges and the level of services provided to residential customers. *Id.* (holding Factor 3 against MSD "[b]ecause the vast majority of MSD fee payers are residential").

In *Missouri Growth*, after MSD had changed its method of determining residential wastewater charges from the uniform flat charge to a variable charge based on each customer's water usage, the court held that the direct relationship test was met. *See* 941 S.W.2d at 623. Thus, "unlike the [prior] residential user charges, MSD's [new] user charges . . . are not uniform flat charges. Rather, the [new] charges . . . are based on a new study that determined sewer services on an individual basis as measured by an individual customer's water usage." *Id.*

Shortly after *Missouri Growth*, in *Mullenix*, the court again upheld sewer and water charges based on the level of water used, rejected the argument that the sewer and water charges did not bear a direct relationship to the level of services received because the charges included billing costs and capability and availability charges, and held that flat and uniform system availability charges included within the user charge "does not prevent a finding that the charge bears a direct relationship to the services rendered." *Mullenix*, 983 S.W.2d at 562 (citation omitted).

Later, in *Larson*, the city's sewer connection fees of \$3,750 for a gravity connection and \$4,250 for a grinder pump connection were upheld under Factor 3

because “the fee is paid for the cost of material and equipment required to make the connection to the main line. The level of goods and services provided to residents is consistent with the fees being charged.” 92 S.W.3d at 132. There was no examination of the actual services provided to each customer or whether the costs or level of those services varied depending on individualized characteristics of the property. Simply, the fee was “consistent” with the costs of services and thus met Factor 3.

And most recently, in *Arbor*, this Court found Factor 3 in the city utility’s favor because the charge varied depending on the customers’ utility use and even though there was a small quarterly flat charge of \$0.75 charged to some accounts. 341 S.W.3d at 685.

Therefore, the cases applying the *Keller* factors, especially those regarding utilities, unmistakably focus on (1) whether the charge uses a measure that reasonably reflects the use and level of services and (2) whether the use and level of services is individually measured (as opposed to a flat, uniform fee). In practice, courts are concerned with whether the charge is a uniform, flat fee for all customers unrelated to the level of services provided, while allowing for some practicality in setting the charge. Importantly, none of these cases prohibits the use of *rates* to allocate costs as the Trial Court’s standard here does, and they recognize that the costs of services *do matter* in setting the rate. So long as the fee is individualized and the measurement of the service relates to the level of services, the charge passes Factor 3. As shown by MSD, the Stormwater User Charge varies by each individual customer because each customer’s impervious area is directly measured. And, as discussed above, the charge relates to the

services¹⁰ provided because impervious area is the correct measure of the level of services required for each customer because impervious area and development causes the need for the services and are related to the costs of providing such services.¹¹

How Can the Different Positions of the Parties Be Reconciled?

Plaintiffs' position is that there is "little, if any relationship" between impervious area and total runoff. (J. ¶¶61-63(LF1557-58;A17-18); Tr.248:4-249:18,501:14-505:16.) MSD maintains that there is (or, more accurately, there is a relationship between impervious area and MSD's services). (Tr.708:11-21, 777:5-778:8,804:24-805:18.) Reconciling these seemingly irreconcilable positions is really quite straightforward.

¹⁰ Ordinance 12560 clearly defined "service" and "serve" as property contributing to stormwater runoff "as a result of the *addition to or construction upon such Property of Impervious Surface.*" (Def.Ex.B at 3,5 (A100,102)(emphasis added).)

¹¹ Inexplicably, the Court of Appeals blatantly mischaracterized MSD's argument on this point: "MSD claims that any charge that varies by individual resident satisfies this factor. . . . Variation of charge between the individual property owners alone is not enough – the variation must be directly related to the level of service being provided to that owner." (App.E.D.Op. at 8(A84).) MSD made no such argument. Rather, as before this Court, MSD argued that its Charge meets Factor 3 because it (1) is a variable rate charge individualized for each customer and (2) is based on the proper measure of the level of services (impervious area).

As set forth in Mr. Theerman's testimony detailed *supra* at 50-51), even without development and impervious area, there is runoff. This is natural runoff, and every property has it. A bigger property has more natural runoff than a smaller property. Natural runoff in an undeveloped area uses a natural stormwater system. By definition, there are no stormwater problems, and no stormwater services are required. There is no cost. (HoelscherDep.Desig. at 98:1-101:4(LF1295-96); Tr.669:10-22,709:10-710:8,835:14-22,1037:5-24.)

Developed properties have impervious area and, therefore, **more** runoff above the natural amount. Development and additional runoff results in stormwater problems and, therefore, causes the need for man-made stormwater services. These services cost money. These are MSD's services for which it must recover its costs and charge its customers.

The issue is who should pay for these services and how. Those who cause the demand for stormwater services – i.e., those with impervious area and more runoff above the natural amount – should pay. As recognized by Professor Debo's book, "when a forested or grassy area is paved, a greater flow of water is placed on the drainage system. This is the demand. The greater the demand (i.e., the more the parcel is paved), the greater the user fee should be." (Def.Ex.WW at 119.) Therefore, the charge should be based on the **additional** runoff created on the property, which is measured by impervious area. (Tr.710:2-713:25,1071:8-18.)

When considering the runoff equations used by Plaintiffs' experts (and MSD in its Design Manual), the calculations show that runoff increases in a linear fashion over the

natural amount as impervious area is added to a property. (Tr.357:12-361:4.) Moreover, these calculations show that adding the same amount of impervious area to two different sized properties results in the *same* amount of additional runoff (over the natural amount) without regard to slope, soil content, and other factors. (Tr.616:10-621:15.) The *total* runoff (i.e., natural plus additional), of course, will be different, because the natural runoff on the two properties is different.

But, as just explained, for purposes of correlating MSD's stormwater services and an appropriate charge, the relationship between impervious area and the *additional* runoff (over the natural amount) is the true relevant consideration. This shows a direct, linear, one-to-one relationship for every property as admitted by Plaintiffs' expert, Jon Jones. (Tr.616:10-621:15.)

Plaintiffs and their experts *simply compared the wrong numbers*. They looked at the relationship between impervious area and *total* runoff (natural plus additional). But *total* runoff does *not* correlate to MSD's services. Thus, by comparing properties with the same amount of impervious area, but wildly different total areas (and therefore wildly different amounts of natural and total runoff), Plaintiffs merely showed "little, if any relationship" between impervious area and total runoff.

In sum, Plaintiffs have demonstrated "little, if any" relationship between numbers that do not represent MSD's services. MSD, on the other hand, has shown there is a direct relationship between the numbers that matter, those that represent MSD's services.

Both courts below merely accepted Plaintiffs' contention of "little, if any" relationship between numbers that do not represent MSD's services without looking at

the underlying facts, which show there is a direct relationship between the numbers that matter, those representing MSD's services. This is *the central issue* in this case, and it simply cannot go unaddressed by this Court.

MSD will first establish why Factor 3 must be found in its favor when the proper standard is considered and then further address the Trial Court's errors seriatim.

1. MSD's Stormwater User Charge Is Individualized, Is Variable and Is Dependent on the Level of Services Provided to Each Customer.

Under the standard set forth above (fee must be individualized and have a reasonable measure of services), MSD's Stormwater User Charge unquestionably is a variable, individualized charge that utilizes the correct measure of service (impervious area), which is affected by and directly related to the level of service because each customer's impervious area was measured by aerial photography and then the charge to each customer varied based on the amount of impervious area (\$0.14 per 100 ft² of impervious area from January 1, 2009 on). (Def.Ex.B §§11,12(A105-06); Tr.680:16-681:2,714:1-23,863:13-866:1,1033:19-1034:10.) Therefore, a customer with 2,500 ft² of impervious area will be billed more than a customer with 2,000 ft² of impervious area. (Tr.895:18-896:12.) This rate methodology is easily understood by the customers because it is simple and logical – and correct. (Tr.714:1-23,852:19-853:13,855:10-19.) Also, unlike many stormwater utilities across the country, MSD does not use the ERU (equivalent residential unit) method, which takes an average amount of impervious area for residences and uses the average to determine the charge (Def.Ex.WW at 119-122;

Tr.680:16-681:2,836:12-837:21), because *Beatty II* clearly forbade a charge based on average use by customers.

Moreover, impervious area is the correct measure for the Charge. Boiled down to their essence, MSD's stormwater services are directly related to the demand caused by the development of customers' property – i.e., the addition of impervious area. (Def.Ex. H at 145-146; Pls.Ex.80(Vol.III) at 137:4-12; Tr.669:23-670:8,708:11-21,710:2-713:25,772:13-20,1007:7-9,1071:8-18.) Before an area is developed, stormwater runoff occurs naturally and flows to the area's creeks and rivers naturally. (Tr.669:10-22,835:14-22,840:13-841:12; HoelscherDep.Desig. at 98:1-101:4(LF1295-96).) By definition, no stormwater services are needed – no pipes, no creek erosion, no planning, no regulations. (Tr.709:10-710:1.) It is only when an area is developed, and additional stormwater runoff is created by that development, that a utility is needed to provide stormwater services. (Def.Exs.H at 79, QQ at 162; Tr.699:6-700:4,708:11-21,710:2-713:25,758:17-24,772:13-20,804:24-805:18,835:8-13,1071:8-18.) Furthermore, the additional runoff generated on a property is entirely dependent on the increased impervious area (e.g., more pavement=more runoff). (Tr.357:12-361:4,602:16-24,606:13-608:5,616:10-621:15,765:7-766:6,894:11-896:12,1037:5-24.) Therefore, the charge is properly based on this addition of runoff, i.e., impervious area.

Although overlooked by both courts below, the books authored by Plaintiffs' experts recognize this same basic principle of impervious area equaling the demand and thus being related to the stormwater services caused by the development. In his book, Professor Debo unequivocally stated that “when a forested or grassy area is paved, a

greater flow of water is placed on the drainage system. This is the demand. The greater the demand (i.e., the more the parcel is paved), the greater the user fee should be.” (Def.Ex.WW at 119,121(“So, it only makes sense to pay for stormwater on the same basis – the more you pave, the more you pay. All citizens can intuitively grasp this concept, and the vast majority feels it is fair.”)). Likewise, in his book, Jon Jones aptly described the concept underlying MSD’s charge: “The fee should be related to service provided, the most common basis being area of impervious surface. . . . Funding does not fall entirely on those who experience flooding problems, but is distributed equitably to all those who contribute to the problem.” (Def.Ex.F4 at 21). Indeed, the Trial Court recognized this principle by finding (in a paragraph authored by it) that the “improved area that already exists . . . has created the need for the stormwater system.” (J. ¶27 (LF1549;A9).)

To further ensure that the charge is related to service, the Ordinances provided a system of credits for customers whose level of service is not suitably determined using the same rate as other customers. In particular, some customers’ stormwater runoff may not enter the stormwater system because their property is internally drained (e.g., drains to a sinkhole) or drains directly to the Mississippi, Missouri, or Meramec Rivers. (Def.Exs.B-E §27; Tr.782:21-783:12,866:11-868:1.) These customers are eligible to receive a 50% credit of the Stormwater User Charge, which is based on the customer’s not creating the demand for services related to the stormwater system itself (i.e., most operation and maintenance and some engineering services), but still creating the demand for all the other stormwater services provided by MSD, including the regulatory,

planning, and Phase II Permit-related stormwater services. (Def.Ex.V; Pls.Ex.39 at 6; Tr.595:19-23,866:11-868:1,1041:1-24.) Another credit is available to customers where the stormwater services are provided by another entity under agreement with MSD. (Def.Ex.B at §27(3)(A109-10).) As a result of agreements between MSD and certain levee districts, the customers within the levee districts receive a 97% credit for MSD's Stormwater User Charge because the levee districts provide almost all the services that MSD would otherwise be providing. (Def.Ex.P; Tr.1043:3-20.) Thus, the Stormwater User Charge is flexible to account for situations where the normal rate is affected by a lower level of service provided by MSD.

Moreover, the cases detailed above further stand for the proposition that a true user fee need not be perfect. *Missouri Growth* exemplifies this approach because the wastewater charge at issue there was not based on the actual, metered water usage for a month, much less metered sewage. Rather, the charge was based on a water meter reading for a "winter quarter" between November and April, which "minimizes the chance of customers being charged for water used for outdoor purposes since the water used outdoors does not enter MSD's [sanitary] sewer system." *Missouri Growth*, 941 S.W.2d at 618. Thus, a customer's monthly bill is a snapshot of a winter water meter reading and remains the same until the next meter reading the following winter. Moreover, the wastewater charge did not measure how much or what kind of wastewater actually left a residence. But water usage is the industry standard for determining wastewater service and is a rational, practical, fair, and equitable means by which to charge. Here, like water usage, impervious area is the industry standard and a common

basis across all MSD on which a rate can be based. (Def.Exs.B at 3(A100), WW at 124; Tr.609:23-610:19,835:8-836:11.)

2. The Courts Below Erred in Adopting Plaintiffs' Strawman Theory.

In stark contrast to the straightforward and practical analysis applied in *Beatty II*, *Missouri Growth*, and *Arbor*, Plaintiffs manufactured a new, academic, overly complicated standard – one-to-one linear relationship – based on a classic strawman argument, i.e., there is no one-to-one linear relationship between impervious area and *total* runoff from a property. Plaintiffs' experts produced two reports and charged over \$400,000 to construct this strawman and then knocked him down with their academic opinions. (Tr.588:19-589:25; LF2647-48.) The Trial Court accepted this new standard, despite its being without a basis in law and despite Plaintiffs' experts' admissions that there *was* a one-to-one relationship between impervious area and the additional runoff on a property from adding impervious area, which, as previously described, is how MSD's services are properly viewed. (Def.Ex.B §1(A101-03); Tr.357:12-361:4,616:10-621:15, 895:18-896:12.)¹²

¹² The Court of Appeals' majority pointed out that the Trial Court did not adopt a one-to-one linear relationship test on Factor 3. (App.E.D.Op. at 9(A85).) Perhaps, but the record establishes that this was the standard that Plaintiffs' experts used in analyzing the Stormwater User Charge. (Tr.248:23-249:18,278:22-279:10,597:10-14.) That Plaintiffs did not include this language in the their Proposed Judgment that was adopted

Plaintiffs' experts interpreted "direct relationship" to require a one-to-one linear relationship between the amount of impervious area and the *total* runoff from a property (runoff naturally occurring plus additional runoff from impervious areas). (Tr.228:17-23, 248:13-249:18,378:16-20,439:16-20,501:14-505:16,597:10-14.) Plaintiffs' experts first established the self-evident concept that the larger the area, the more total stormwater runoff that would come from the property. (Tr.241:23-242:10,552:15-553:19.) They then opined that, in order for there to be a direct relationship, the total runoff from a piece of property would need to progress in one-to-one fashion with the addition of more impervious area and concluded through calculations that this was not the case. (Tr.247:25-249:18,258:23-263:22,439:11-440:9.) Additionally, Plaintiffs' experts performed analyses of different parcels of property with similar amounts of impervious area (but vastly different amounts of total area) and showed that the total runoff was not the same. (Tr.501:4-505:20.) The Trial Court erred by accepting this strawman theory for several reasons.

First, there is no case cited by Plaintiffs or the Trial Court requiring a perfect or one-to-one linear relationship. To the contrary, several cases found in favor of the public entity's user charge without such perfection. *See Arbor*, 341 S.W.3d at 685; *Missouri*

wholesale by the Trial Court does not change the underlying premise of Plaintiffs' experts' opinions. Regardless, there can be no dispute that their opinions of "little, if any" relationship are dependent on looking at irrelevant calculations of *total* runoff, not the additional runoff that is the basis of MSD's services and Charge.

Growth, 941 S.W.2d at 623; *In re Tri-County Levee Dist.*, 42 S.W.3d at 788 (upholding charge where levee district based the level of service on an “*estimate* of increased physical efficiency and decreased maintenance costs afforded by Tri-County’s levees”) (emphasis added); *see also Massachusetts v. United States*, 435 U.S. 444, 467-70 (1978) (holding that charge that was a “fair approximation of the cost” of service was not a tax).

Second, the strawman is based on the mistaken premise that the “assumption” underlying the charge was the existence of a direct relationship between the impervious area and the total runoff from a property. (J. ¶58(LF1556;A16).) In support of this, the Judgment relied on non-specific materials from the Rate Commission proceedings (which in context are at odds with Plaintiffs’ strawman) that discuss just “runoff” without distinguishing between “total” runoff and the additional runoff from development. (*Id.*) However, this supposed evidence from the Rate Commission never used the term “total” runoff, and the uncontroverted testimony was that the focus of MSD staff, its rate consultant, the Rate Commission, and the Board in developing the Stormwater User Charge was on the additional runoff from impervious area. (Def.Ex.H; Tr.745:9-19, 760:20-25.) This is best illustrated by Mr. Theerman’s cross-examination testimony (Tr.765:7-766:1.):

A. We were really concerned with impervious rate with respect to the developed property and how that development impacts the stormwater system and so hydrologic calculations with respect to total runoff weren’t what we were focusing on.

Q. So total runoff wasn’t what you were focusing on?

A. That's not what I was focusing on, no.

Indeed, this Court need not look further than the Ordinance itself, which defines “Served” and “Service” as “Property which contributes to Stormwater Runoff which is drained through the Stormwater System *as a result of the addition to or construction upon such Property of Impervious Surface*” and further states that “owners or users of improved property . . . are served by and benefit from the Stormwater System in that the manmade impervious surface on such improved property contributes to stormwater runoff which occurs from such property, *beyond the amount which would occur if such property were undeveloped and in its natural state.*” (Def.Ex.B at 3,§1(A100,102) (emphasis added).) The Ordinance thus accurately and succinctly describes why impervious area is used as the measure of service. The testimony affirmed this basic premise. (Tr.699:6-700:4,708:11-21,777:5-778:8,863:8-864:18,865:13-866:1,894:11-895:5,1037:5-24,1071:8-18.) The Trial Court did not find that MSD’s testimony and evidence (including the language of the Ordinances) that MSD was concerned with additional runoff from impervious area was not credible. Therefore, the Trial Court committed error by accepting a new standard without basis in law or fact.

Third, even if Plaintiffs’ one-to-one direct relationship were the correct standard, MSD should still prevail on Factor 3 when the correct numbers are analyzed. Both of Plaintiffs’ experts admitted that, in using the standard runoff formula (also used by MSD), the additional runoff from the impervious area progressed in a linear, one-to-one fashion (i.e., adding 100 ft² of impervious area adds a proportionate amount of runoff from that property). (Tr.357:12-361:4,616:10-621:15; Def.Ex.G4.) An examination of

Plaintiffs' experts' calculations and graphs confirms the basis of MSD's Stormwater User Charge – when impervious area is added to a parcel of property, there is additional runoff from that property that did not exist when the property was in its natural state. (Def.Ex. G4; Tr.616:10-621:15.) Plaintiffs' expert Jones admitted that a direct, one-to-one relationship existed between impervious area and runoff from impervious area and that this relationship was unaffected by slope, soil type, or other factors. (Tr.616:10-621:15.)

This is best illustrated by looking first at Table 2 of Pls.Ex.67 (Figure 1 on page A115 of the Appendix) prepared by Professor Debo, which calculates runoff on a 10-acre site for the 20-year design storm. But Professor Debo's Table 2 (A115) omitted a key piece of data – the runoff when there is no impervious area, which shows the naturally occurring amount of runoff from the property. For this same 10-acre site, that naturally occurring runoff is 16.8 cfs (cubic feet per second). (Def.Ex.EEE at 78-79.) The table (Figure 2) on page A116 of the Appendix simply reproduces Professor Debo's table, but adds a row for 0% impervious area and adds a column showing the additional runoff resulting from the addition of impervious area (by merely subtracting the naturally occurring runoff from the total runoff). (A116.)

Looking at the additional runoff resulting from the addition of impervious area in this table (Figure 2, A116), the numbers progress in a linear fashion. For example, the additional runoff for 20% impervious is 4.1 cfs, and the additional runoff for 40% is 8.2 cfs. (A116.) So when the impervious area doubles, the additional runoff likewise doubles. (Plaintiffs' experts cleverly – but incorrectly – compared total runoff figures (i.e., 20.9 cfs versus 25.0 cfs) to show that runoff did not double.) A simple graph of

Professor Debo's data (Figure 3 on page A117 of the Appendix) demonstrates this linear relationship, with the dashed-line showing the naturally occurring runoff. When the naturally occurring runoff is subtracted from their calculations – as it should be when considering the impact of development on stormwater services – the linear relationship is evident. (Tr.351:22-354:7, 357:12-361:4, 616:10-621:15.) And Plaintiffs' experts admit it. (*Id.*)

Fourth, contrary to Plaintiffs' and the Trial Court's unreasonable conclusion (J. ¶64(LF1558;A18).), the opinions of Plaintiffs' experts that no relationship existed between impervious area and runoff *were* challenged at trial. Plaintiffs' evidence was merely that more area contributed more to total runoff than impervious area, and this is what their calculations showed. (Tr.241:23-242:10,552:15-553:19.) To be candid, MSD did not quibble with their math, and the concept itself is common sense – e.g., if you think of a property as a bucket, the larger the bucket, the more water will collect in it. However, through Plaintiffs' experts' own testimony, calculations, and books, MSD demonstrated that the addition of more impervious area to a piece of property increased the runoff from the property. (Def.Exs.WW at 119-124, F4 at 21; Tr.357:12-361:4, 466:16-19,616:10-621:15.)

Finally, it must be stressed that the Trial Court did not make any credibility findings in its Judgment, let alone any determination that the opinions offered by Plaintiffs' experts were more credible. Thus, the Trial Court's acceptance of Plaintiffs' strawman theory is not entitled to any deference, and the Court of Appeals (App.E.D.Op. at 9(A85) was mistaken in doing so. *See Hoffman v. City of Town & Country*, 831

S.W.2d 223,225 (Mo.App.E.D. 1992) (no deference was due where experts used different sets of facts and no credibility finding was made by trial court). The point is that, while Plaintiffs' experts' calculations may be correct, they do not prove any point that is relevant to MSD's stormwater services.

3. The Trial Court's Factor 3 Analysis Underscores Its Misunderstanding of How Utility Rates Work.

Much of Plaintiffs' and the Trial Court's analysis of the third *Keller* factor misunderstands how utility rates work. For instance, the Trial Court criticized the Stormwater User Charge as "simply a way of apportioning its total stormwater costs amongst its fee payers," as a pro rata share of MSD's stormwater costs, and as a means to distribute the costs of the service. (J. ¶¶25,65,67,69,103,114(LF1548,1558-59,1567, 1569; A8,18-19,27,29).) Yet this is what all utility rates (like the ones upheld in *Arbor* and *Missouri Growth*) do – all the costs of providing the services and running the utility are determined and then a common measurement is used to fairly and equitably allocate those costs to the customers. (Tr.170:21-171:1,852:19-853:13,865:13-866:1,961:20-963:23.) There is simply no other way to charge in a principled manner and to avoid a municipality gaining a windfall by charging more than the services cost.

Similarly, MSD is criticized because it cannot and does not identify the specific services or the amount of services it provided each month. (J. ¶¶44,46-50,114-16 (LF1553-54,1569-70;A13-14,29-30).) No utility rate does this. Actual services and the costs of those services to each individual utility customer can be impractical, if not impossible, to quantify. Thus, a rate is used to recover the costs of service. (Tr.396:23-

397:17,574:23-575:22,767:8-25,788:3-789:17,865:13-866:1; HoelscherDep.Desig. at 80:16-81:10(LF1290).) For example, electric or gas utilities do not vary their rates by each customer based on the location or characteristics of a property, such as how far the property is from the distribution center or whether the utility was trimming trees, replacing transformers, or installing new gas mains in the area in the past month. (Tr.574:23- 575:22,788:3-789:17.) Yet this is what the Trial Court required of MSD's Stormwater User Charge. Indeed, under Plaintiffs' and the Trial Court's analysis, any rates charged by municipal utilities would not meet Factor 3, which is directly in conflict with *Arbor* and *Missouri Growth*. See, e.g., *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n*, 186 S.W.3d 376,384 (Mo.App.W.D. 2005) ("ratemaking involves the making of pragmatic adjustments") (internal quotations and citation omitted); *Mullenix*, 983 S.W.2d at 562.

4. The Trial Court's Finding that the Charge Must Be Based on the Actual Runoff Also Was Error.

The Trial Court further based its decision on Factor 3 on the fact that the Stormwater User Charge is not based on the actual runoff from a property (i.e., dependent on rainfall). (J. ¶¶45,112,114,116(LF1553,1569-70;A13,29-30).) The Trial Court also found that "[i]t would be impractical, if not impossible for MSD to determine the amount of runoff from given properties." (J. ¶45(LF1553;A13).) Therefore, aside from actual

runoff being immaterial,¹³ Plaintiffs and the Trial Court built an impractical and insurmountable standard for MSD to meet. This conclusion is reinforced by the admissions of Plaintiffs' experts that they did not take cost and practicality into account in analyzing the Stormwater User Charge under Factor 3 and that their Factor 3 "standard" is next to impossible to meet. (JonesDep.Desig.241:25-242:5, 247:10-248:10, 250:15-251:10(LF1027-29); DeboDep.Desig. at 129:13-19(LF985); Tr.379:16-380:14,585:7 -586:10,586:24-587:4,599:2-7,609:3-22.) In fact, according to Plaintiffs' expert Jones, MSD might not even meet Factor 3 if MSD spent \$5,000-\$10,000 on each property (a total of \$2.4 to \$4.8 billion to collect \$40 million annually) to analyze runoff characteristics like he did. (Tr.603:10-605:1.)¹⁴

The Judgment also found that MSD's "primary service" was "handling of stormwater runoff." (J. ¶¶56,112 (LF1556,1569;A16,29).) The Court of Appeals

¹³ The costs of MSD's stormwater services are not related to how much it rains or the amount of runoff coming off a property at any given time. *See supra* at 32-33.

¹⁴ In any event, while other characteristics of property discussed by Plaintiffs' experts like soil-type, slope, and vegetative cover might be relevant in an academic exercise of calculating runoff estimates, in the real world of a stormwater utility, such characteristics are irrelevant because MSD does not consider these factors in designing the system. (Tr.713:13-25, 835:23-836:11, 857:22-858:14.) Indeed, under MSD's Rules and Regulations, the only variable in the formula used to calculate runoff for an area is impervious area. (Def.Ex.EEE at 46-47,78-79,Table 4-2; Tr.1022:19-1024:12.)

likewise erroneously followed this finding. (App.E.D.Op. at 7-9(A83-85).) These findings are faulty for two reasons. First, the operation and maintenance of the stormwater system represents only half of the costs to provide MSD's stormwater services – a fact recognized by Plaintiffs' expert Jones. (Tr.594:3-20,595:19-23,866:11-868:1,1041:1-24.) Second, the amount of runoff or rainfall in each month does not affect the level of MSD's services or the costs related thereto because MSD's services are based on large design storms and the fact of runoff from development (which causes the need for planning and regulations), not on how much it rains. (Tr.375:24-376:8,1019:13-1022:4,1030:18-1031:13.) Thus, the amount of runoff from a property (based on how much it rains) is not equated to "actual use" of MSD's system. (Cf. J. ¶116(LF1570; A30).)

As shown, when the cases are examined in their proper context and the truly relevant evidence is considered, MSD's Stormwater User Charge meets the third *Keller* factor as it has been interpreted by this Court because it is an individualized and variable charge that uses impervious area as the proper measurement of the level of service to each customer.

D. MSD PROVIDES STORMWATER SERVICES TO ITS CUSTOMERS, AND THE REVENUES FROM THE STORMWATER USER CHARGE WERE USED TO PROVIDE THOSE SERVICES AND NOT PAID INTO MSD’S GENERAL REVENUES, THEREBY SATISFYING FACTOR 4.

The fourth *Keller* factor asks whether a specific service is provided for the user charge:

Is the government providing a service or good? – If the government is providing a good or a service, or permission to use government property, the fee is less likely to be subject to the Hancock Amendment. If there is no good or service being provided, or someone unconnected with the government is providing the good or service, then any charge required by and paid to a local government is probably subject to the Hancock Amendment.

Keller, 820 S.W.2d at 304 n.10. This factor is intended to distinguish user fees from taxes generally that are paid without relation to a specific service. *See Beatty II*, 867 S.W.2d at 221. For example, a municipality may impose a general *ad valorem* property tax or a sales tax to pay for all municipal services like police, planning and zoning, or city hall.

In numerous utility cases (two involving MSD), this Court and the Court of Appeals easily resolved this factor in favor of the governmental utility. *See Arbor*, 341 S.W.3d at 685 (gas and electric services); *Beatty II*, 867 S.W.2d at 221; *Larson*, 92

S.W.3d at 133 (sewer connection services); *Mullenix*, 983 S.W.2d at 562 (water and sewer services); *Missouri Growth*, 941 S.W.2d at 624; *see also Home Builders Ass’n v. City of St. Peters*, 868 S.W.2d 187,190 (Mo.App.E.D. 1994). Indeed, in this case, the Court of Appeals’ majority opinion held: “This factor is easily resolved in favor of MSD. It is undisputed that MSD provides a service in developing and maintaining the stormwater runoff system and through other ancillary activities. The trial court erred in ruling otherwise.” (App.E.D.Op. at 9(A85).)

1. MSD Is Providing Stormwater Services.

There is no dispute that MSD provides stormwater services to its customers. In fact, to be frank, everyone recognized that MSD provides stormwater services. On at least 21 instances in the Judgment, the Trial Court referenced MSD providing stormwater services or customers receiving the benefits of those services. (J. ¶¶27,43,44,46-50,52,53,56,57,65,67,72-74,79,90,112(LF1549,1553-56,1558-61,1564,1569;A9,13-16,18-21,24,29).) Each of Plaintiffs’ witnesses testified about the services provided by MSD. Plaintiffs Zweig and Milberg acknowledged services being provided by MSD. (Tr.99:1-5,141:15-142:5.) Professor Debo admitted that MSD was performing stormwater services relating to operation and maintenance, regulatory, and planning. (DeboDep.Desig.65:13-66:4,134:19-24(LF982,986); Tr.197:18-198:20,375:1-14.) Not only did Mr. Jones admit that MSD provides stormwater services, but he went into great detail about the nature and extent of MSD’s operation, maintenance, regulatory, and planning services. (Tr.594:3-20; *see also* Tr. 577:25-578:23; JonesDep.Desig. at 106:18-19,107:14-108:21(LF1005).)

The evidence also detailed the limited services that MSD provided prior to the Stormwater User Charge (e.g., operation and maintenance of stormwater facilities on a band-aid emergency basis and some regulatory and planning) and then the “additional services” that MSD would be able to provide under the Stormwater User Charge, including a program of preventive maintenance (like cleaning and repairing inlets and replacing or rehabilitating pipe) and enhanced services (like creek erosion control). (Tr.682:24-684:4,685:9-686:1,1001:23-1002:19,1028:18-1029:20; Pls.Exs.18 at 2-10, 2-11; 25 at 22; 38 at 9:13-10:15; 39 at 12; 44 at 27:14-28:14,98:13-25,158:15-22; Def.Ex.H at 90-91.) Indeed, the undisputed fact was that MSD had not been performing stormwater services at an appropriate level and that more revenues were required to provide these services (including new regulatory and planning services mandated by the federal and state government) at a level satisfactory to its customers. (Tr.667:19-668:22, 682:24-684:4,685:9-686:1,1001:6-21.)

Additionally, the stormwater services MSD was performing at the time of trial was not contested. Federal and state clean water laws mandate that MSD provide regulatory and planning services, including MSD’s responsibilities as lead permittee on the Phase II Permit, and require reports on how MSD performs those services. (Def.Exs.I,K,NN, DDD; Tr.1014:2-1017:5.) The testimony of Messrs. Theerman, Hoelscher and Sedgwick detailed MSD’s stormwater services (operation and maintenance of the system, regulatory services, planning services), but further described the new enhanced services (like new construction and erosion control) that were in their infancy at the time of trial, including the 1,085 possible projects at a cost of \$600 million identified by MSD.

(Def.Ex.M; Tr.715:1-14,875:14-876:12,1005:17-1006:24,1028:18-130:17,1077:12-1078:3.) The prime example of an enhanced-type service actually performed by MSD was the rebuilding of the severely eroded banks of Fishpot Creek in St. Louis County, which endangered homes and was caused by the proliferation of development and its attendant impervious area over the years. (Def.Ex. BB; Tr.1053:9-1056:7; Hoelscher Dep.Desig.234:3-236:6(LF1323-24).)

Furthermore, it is not disputed that the revenues generated from the Stormwater User Charge were placed in a separate fund and were spent on providing stormwater services, rather than used as general revenue for MSD. (Def.Ex.C at 3, §21; Tr.682:18-23,719:3-6,970:6-971:20.) Plaintiffs' experts confirmed that all the revenues from the Charge were spent on stormwater, and not other, services. (Tr.386:22-387:1,596:22-597:7; DeboDep.Desig. at 267:5-13(LF996).)

Yet, incomprehensibly, despite the rulings in all the prior cases, the mountain of evidence, and its own 21 separate findings of service, the Trial Court still found the fourth *Keller* factor in favor of Plaintiffs by finding that MSD was not providing any service or at least any new service. This was clear error as recognized by the Court of Appeals.

2. The Trial Court's Requirement That a New Service Must Be Provided in Order to Meet Factor 4 Is Contrary to Settled Law.

The linchpin of the Trial Court's finding Factor 4 against MSD was that MSD was not providing a new service. (J. ¶¶71-72,119(LF1560,1571;A20,31-2).) The Trial Court's and Plaintiffs' mistaken analysis on Factor 4 was based on a distorted application

of the *Building Owners* case. At the outset, there is no support in any case, including *Building Owners*, for the proposition that a new service must be provided to meet Factor 4. If this were a requirement, then the charges in *Beatty II*, *Missouri Growth*, and *Larson* certainly would have failed Factor 4 because, in each of those cases, the sewer utility had been providing the very same services, but had been charging for the services in a different way. Indeed, the Court of Appeals recognized the Trial Court's erroneous analysis, by holding:

The trial court appears to have applied a new consideration under this element – whether the municipality provided a “new” service after it changed funding schemes. ***There is no support for this consideration in the caselaw.*** The relevant analysis under this factor is simply whether the city provides any service in return for the charge, not whether it provides a “new” service. *Missouri Growth*, 941 S.W.2d at 624.

(App.E.D.Op. at 9-10(A85-86)(emphasis added).) Therefore, the misstatement and misapplication of the law by Trial Court on Factor 4 could not be more evident.

On a more basic level, this requirement makes no sense, even under Plaintiffs' “revenue-driven policy changes” analysis. A political subdivision is allowed the flexibility to use different ways to fund services it provides. *See Keller*, 820 S.W.2d at 304 (“The Hancock Amendment . . . does not prohibit [government] from shifting the burden to the private users of these services.”); *Ashworth*, 53 S.W.3d at 577 (finding Factor 4 for city where new fee paid for a service that had been a drain on the general fund). For example, a city might fund its municipal pool through a parks and recreation

sales tax. If the city later determines it wants to shift to charging residents an entrance fee because the pool is draining the general revenues, it is free to do so, even though it does not provide a “new” service.

Nevertheless, *Building Owners* is not applicable to the case at hand. First, the fire inspection fee in *Building Owners* is completely different from MSD’s Stormwater User Charge. In that case, fire inspections previously were performed as part of the fire code enforcement, were done only upon complaints, and were funded by general tax revenues. Thus, the court held that the City was converting an enforcement activity into a service in order to increase revenues, which was, indeed, the express purpose of that charge. *Bldg. Owners*, 231 S.W.3d at 214.

Therefore, as demonstrated, a “new service” is simply not a consideration under Factor 4, and the Trial Court’s and Plaintiffs’ reliance on *Building Owners* to support this incorrect consideration is factually and legally deficient.

3. Even if Factor 4 Does Require That New or Different Services Be Provided, Which It Does Not, MSD’s Stormwater Services Under the Stormwater User Charge Were New and Different.

Even if a new or different service were required to meet Factor 4, it cannot be disputed that MSD’s stormwater services changed after it adopted the Stormwater User Charge. Before the Charge, stormwater services were being provided at an inadequate level, and the level of services varied widely depending on the location of the property (because ad valorem taxes varied throughout MSD). (Tr.682:24-683:25.) Maintenance was done on a band-aid, emergency basis, and no infrastructure improvement occurred.

(*Id.*; Tr.1001:6-21.) Under the Charge, MSD was able to provide regular maintenance and was beginning capital improvements. (Tr.1001:23-1002:19.) Likewise, before the Charge, a property in West St. Louis County would have received the bare minimum of services, whereas a property in an OMCI district would have received more and better service. (Tr.1402:18-1405:23,1407:20-1409:1.) Under the Stormwater User Charge, each customer, no matter the location, received the same kind and level of services. (Tr.1402:18-1405:23.)

The ever-increasing Phase II Permit services and other management and regulatory services and the increased level and nature of stormwater services (i.e., more services performed at higher levels) since the implementation of the Stormwater User Charge easily meet this misplaced standard. (Tr.685:9-686:1,1001:23-1002:19.)

**4. The Trial Court Misstated and Misapplied the Law by
Purporting to Consider Whether Certain Customers Paid the
Charge, But Were Not Receiving Service.**

Another legal deficiency regarding Factor 4 is the Trial Court's conclusion that MSD improperly charges, or does not provide credits to, (unidentified) customers supposedly "maintaining predevelopment runoff conditions" by implementing certain BMPs and LIDs, and thus MSD is not providing "measurable service" to these customers. (J. ¶120(LF1572;A32).) This is another instance of the Trial Court's taking Plaintiffs' arguments from Factors 2 and 3 (because credits would appear to be relevant to how the charge is affected by service) and applying them to other factors, which no case allows. *See Ashworth*, 53 S.W.3d at 576. The Court of Appeals found this analysis

was error, holding: “The trial court also conflated the analysis under this factor with factor two. In its discussion of this factor, the trial court considered the fact that certain residents are charged stormwater user charges but do not receive any service. This is more properly a consideration under factor two, and, as such, does not support the trial court’s conclusion.” (App.E.D.Op. at 10(A86).) However, no matter where this conclusion is placed, it is erroneous for several reasons.

First, the “maintain predevelopment conditions” premise is wrong. As previously explained, MSD’s system is designed for the largest rain events (i.e., 15- or 20-year design storms). MSD does not mandate that a newly developed property must maintain the same level of stormwater runoff in those conditions. The requirements that Plaintiffs and the Trial Court tout for this notion of “maintaining predevelopment conditions” are not applicable in these large storms. As Mr. Hoelscher explained, MSD’s Rules and Regulations require that newly (after 2006) developed properties install BMPs (like a rain garden or infiltration trench) for water *quality* purposes (not runoff reduction), but only to maintain such conditions in a *small storm* (e.g., 1- or 2-year storm), not the large 15- or 20-year storms for which MSD’s stormwater system is built. (Def.Ex. EEE at 65-67, Tr.1091:13-1024:12,1025:2-1026:8,1027:18-1028:14).) In these large design storms, these BMPs are inundated and ineffective, and most certainly *do not* maintain predevelopment conditions. (Tr.1025:19-24,1026:19-1028:14.) The detention requirement similarly does not maintain predevelopment conditions. As Mr. Hoelscher explained, detention basins are designed only to maintain the peak rate of runoff, but the total volume of runoff is greater than before and it still enters the stormwater system.

(Tr.1026:19-1028:14,1039:7-15.) In any event, when designing a stormwater facility downstream of a detention basin, MSD's Rules and Regulations require the engineer to assume that the upstream detention basin does not exist. (Def.Ex.EEE at 67; Tr.1027:11-17.) So not only do BMPs and LIDs fail to maintain predevelopment conditions in the relevant design storms, they do not lower the costs of services; they actually increase MSD's costs because of having to regulate and inspect them. (Tr.633:13-634:15, 1027:18-24,1045:21-1046:8.)

Second, credits should only be offered where there is a cost savings to MSD. (Tr.866:11-20.) Professor Debo admitted that credits for BMPs and LIDs are not related to cost reductions, but are policy-driven incentives for people to construct things that may be helpful to a stormwater program. (Tr.378:16-379:15,384:21-385:24.) Yet again, if MSD offered credits for BMPs and LIDs that had no reduction in costs of service, Plaintiffs would likely point to these credits as evidence that the charge is *unrelated* to the level of service and that the credits merely try to incentivize environmentally sound behavior.

Finally, the implementation of BMPs and LIDs (required after 2006) is relatively insignificant in MSD's operating and maintaining its stormwater system, which was constructed and developed almost entirely before these new regulations. (Tr.707:12-18.)

Thus, once the incorrect analysis of the Trial Court is cast aside, it is beyond dispute that MSD provides stormwater services. And *all* the money collected under the Charge was used exclusively to provide stormwater services; none was paid into the

general fund or used to fund other services and activities. The Trial Court erred by finding that MSD does not provide services because such a conclusion is based on an erroneous legal conclusion and results from a misapplication of the law to the facts.

E. IN ADDITION TO MSD, PRIVATE INDIVIDUALS AND ENTITIES PROVIDE STORMWATER SERVICES, THEREFORE WARRANTING A FINDING OF FACTOR 5 IN MSD’S FAVOR.

The fifth *Keller* factor asks about who has provided stormwater services:

Has the activity historically and exclusively been provided by the government? – If the government has historically and exclusively provided the good, service, permission or activity, the fee is likely subject to the Hancock Amendment. If the government has not historically and exclusively provided the good, service, permission or activity, then any charge is probably not subject to the Hancock Amendment.

Keller, 820 S.W.2d at 304-05 n.10.

To be fair, under the cases decided before *Arbor*, MSD concedes it would have been challenging for it to prevail on Factor 5, although an “inconclusive” finding would have been appropriate. However, in *Arbor*, this Court clarified that there are three prongs to this factor: (1) “whether the service is one provided by private versus public entities generally”; (2) whether the service was historically provided by the government; and (3) whether the service was being exclusively provided by the government at the current time. *Arbor*, 341 S.W.3d at 685-86. When the Trial Court found this factor against MSD because no other entities provided services for a charge (J. ¶¶122-23(LF1572-73;A32-

33)), it did not have the benefit of *Arbor*. When the evidence at trial is reviewed under *Arbor*'s clarified standard, Factor 5 should be found in MSD's favor.

First, with respect to whether the services were provided by public or private entities generally, *Arbor* held it was inconclusive because "the kinds of services . . . sometimes are provided by public and at other times by private entities." *Arbor*, 341 S.W.3d at 685. Here, some of the "kinds of services" performed by MSD (such as construction and maintenance of stormwater facilities or erosion control) have been performed by private entities generally, as recognized by Plaintiffs' experts. (Tr.197:10-15,217:6-25,590:17-592:0,593:13-594:2.)

Second, *Arbor* found that the utilities had not been exclusively and historically provided by the city. *Arbor*, 341 S.W.3d at 685. Here, the evidence was consistent that entities other than MSD such as developers, homeowners' associations, large industrial entities, and even individual homeowners have provided the kinds of services that MSD provides. (Def.Ex.F4 at 16; Jones Dep.Desig. at 328:14-329:4; Tr.90:11-93:19,157:4-19,715:18-717:8.). Private entities are providing stormwater services, and such services were not historically provided only by MSD. Drs. Zweig and Milberg testified that they, either as individuals or through their subdivision, have performed stormwater services like erosion control and detention basin maintenance on their properties. (Tr.90:11-93:19,143:1-21,157:4-19.) Similarly, Mr. Theerman testified that the subdivision in which he lives has a stormwater system that was never dedicated to MSD, and, therefore, the roughly 25 owners in the subdivision pay for the operation and maintenance of that system. (Tr.715:8-717:8.) Mr. Jones testified that, within MSD, there are private entities

that have NPDES (National Pollutant Discharge Elimination System) stormwater permits from the EPA or Department of Natural Resources, that many large commercial and industrial entities provide their own stormwater management and services on site, and that private entities (not MSD) construct the stormwater infrastructure and maintain the system before dedication to MSD. (Tr.590:17-592:9,593:13-594:2; JonesDep.Desig. at 328:16-329:4(LF1039-39); Def.Ex.F4 at 16.) Professor Debo confirmed that subdivisions provide stormwater services such as building and maintaining detention basins. (Tr.197:10-15,217:6-25.) Messrs. Theerman and Sedgwick testified that private entities finance and build the stormwater infrastructure and then operate it until they dedicate it to MSD, that some systems are operated and maintained by private entities and individuals, and that private entities and individuals operate and maintain detention basins. (Tr.715:18-717:8,876:18-877:14.) Also, the Ordinances make it clear that MSD does not maintain certain facilities, such as detention basins, listed in the Ordinances' Appendix and that MSD does not accept dedication of certain facilities. (Def.Ex.B §5, App.I.(A101,111-13)) Therefore, the record shows other entities have provided stormwater services in the past and continue to do so today.

Finally, *Arbor* found against the city because it was exclusively providing the services at the time of the case as the city's ordinances prohibited others from "providing a competing service." *Arbor*, 341 S.W.3d at 685. This Court held that this final consideration tilted Factor 5 in favor of the plaintiffs. *Id.* at 686. Here, MSD does not prohibit any such competing service. To the contrary, the Ordinance implementing the

Stormwater User Charge expressly states that MSD does *not* perform certain stormwater services or accept certain stormwater facilities. (Def.Ex.B §§3-5(A103-04),App.I.)

Therefore, under *Arbor*, the fifth *Keller* factor should be resolved in MSD's favor or, at a minimum, the factor should be found inconclusive.

F. ALTHOUGH NECESSARY ONLY WHEN THE *KELLER* FACTORS ARE INCONCLUSIVE, OTHER FACTS AND LAW DEMONSTRATE THAT THE STORMWATER USER CHARGE IS NOT A TAX.

In *Arbor*, this Court held that factors besides the *Keller* factors may only be considered in the minority of cases “when the balance [of the *Keller* factors] is a close one.” 341 S.W.3d at 683. As demonstrated above, the balance of the factors weighs overwhelmingly in favor of MSD in this case, but, if other factors are considered, they must be considered appropriately, which the courts below did not do.

1. The Consideration of Improper Factors by the Courts Below.

Plaintiffs and the Trial Court attempted to graft a new, amorphous factor – “The Stormwater Charge Bears All of the Characteristics of a Tax” – onto the *Keller* analysis. (J. ¶¶89-93(LF1564-65;A24-25).) Similarly, the Court of Appeals opinion was imbued with a “just let the voters decide” attitude that is anathema to the approach approved by this Court in *Keller* and *Arbor*. With one exception (discussed *infra*), the consideration of these additional factors was erroneous for multiple reasons. At the outset, this vague, general concept that a Trial Court needs only to examine a charge using common sense is contrary to the holdings of *Keller* and *Arbor*. In fact, the five *Keller* factors are based on Missouri's traditional definition of what a tax is. *Keller*, 820 S.W.2d at 303-04; *see also*

discussion *supra* at 25. Therefore, a generalized and non-specific analysis outside of the five factors is unnecessary. Moreover, in *Arbor*, this Court rejected a similar contention that only one factor (sole provider of a service) needed to be considered by the Court in deciding whether the charge was a tax. 341 S.W.3d at 686. Here, then, the Trial Court's reliance on the one overarching factor of "characteristics of a tax" was in error, and the error was compounded because this consideration poisoned the Trial Court's analysis of the *Keller* factors through the Trial Court's repeated consideration of "benefits," rather than focusing on the nature and mechanics of the service and the charge.

Apart from its legal deficiencies, the "characteristics of a tax" analysis is a house of cards. First, the Trial Court found that half of MSD's services were of "general benefits" to MSD's customers, purportedly by relying on *Feese*. (J. ¶90(LF1564;A24).) This premise did not come from the *Feese* Court's Factor 3 analysis or even that Court's *Keller* analysis. Instead, Plaintiffs lifted the premise from the part of that opinion that addressed whether the charge at issue was covered by ballot language previously approved by voters. *Feese*, 893 S.W.2d at 813-14. This Court merely held that the authorization for charges "for the use and services of the system" did not include the ability to charge properties unconnected to the sewer system because such properties received no specific benefit. *Id.* Clearly, this "general benefit" analysis is considered when the validity of an ad valorem tax is at issue, but not in the case at hand involving a specific user charge paid only by residents who cause the need for the services. *See supra* Part I.B. Moreover, this "general benefit" analysis is based on Plaintiffs' and the Trial Court's misconception that MSD must provide an individualized amount of benefits

and services each month and be able to show them. (*See, e.g.*, J. ¶¶46-50,65,67(LF1553-54,1558-59;A13-14,18-19).) However, that is not how any utility rate works because the level of services do not equate to benefits. The issue is who creates the demand for services and who increases the costs of providing such services. Here, MSD is handling the stormwater demand caused by development of land. Therefore, it is the impervious area that affects the level of services required to be provided, not some ethereal concept of “benefits.”

Plaintiffs and the Trial Court further found, without any actual factual support, that MSD’s motivation was to disguise a large and unnecessary tax increase as a charge to avoid going to the voters. (J. ¶91(LF1564-65;A24-25).) Similarly, the Court of Appeals chided MSD for not simply submitting the Stormwater User Charge to a vote. These accusations are really just idle speculation based on the ultimate question in this case – whether a charge must be submitted to the voters. Moreover, unlike in *Building Owners* where the City admittedly told its fire department to invent a “service” charge to raise more revenues, 231 S.W.3d at 210, there was absolutely no evidence that the Stormwater User Charge was created to generate more general revenue by converting an enforcement activity into a nominal service. To the contrary, all the evidence showed that the demands for MSD’s services were being dramatically increased because MSD needed to provide adequate services throughout the District and because of the increasing requirements under the Phase II Permit and clean water laws. (Tr.685:9-686:1,1001:23-1002:19.)

Arbor noted that *Beatty II* looked at whether a lien can be imposed on the customer's property for failure to pay the charge in a close case. 341 S.W.3d at 686. It is respectfully submitted that this Court should reconsider whether this "lien factor" is actually indicative of a tax. Indeed, it is not indicative one way or the other. Neither *Beatty II* nor *Arbor* explained the rationale for considering a lien. The laws of this State allow for liens to be placed on property when various, *non-tax* charges are not paid. *See, e.g.*, R.S.Mo. §§ 429.010 (mechanic/materialman's lien); 429.609 (real estate broker's lien); 430.020 (lien for storing or repairing vehicle or aircraft); 484.130 (attorney's lien). Therefore, the ability to place a lien on property as a mechanism to recover payment for services – whether by a mechanic, contractor, real estate agent, lawyer, or a governmental entity – is simply not indicative of whether the charge is, or is not, a tax.

Moreover, in the case at hand, there was no evidence that MSD has used the lien power in its Stormwater User Charge, and, like *Arbor*, MSD has other avenues like late fees and collection lawsuits by which to recover unpaid charges. (Def.Ex.B §§13,16 (A106-07).)

2. There Are Key Factors that Weigh in MSD's Favor Worthy of Consideration.

The Trial Court failed to analyze key factors and considerations that weigh in favor of the Stormwater User Charge's not being a tax. First, the law is well-settled that there are strong presumptions that municipal ordinances, and in particular those relating to utility rates, are valid and constitutional unless there is a clear contravention of the constitution or the rates "are clearly, palpably and grossly unreasonable." *See St. Louis*

Univ. v. Masonic Temple Ass’n of St. Louis, 220 S.W.3d 721,725 (Mo.banc 2007); *McCollum v. Dir. of Revenue*, 906 S.W.2d 368,369 (Mo.banc 1995); *Shepherd v. City of Wentzville*, 645 S.W.2d 130,133 (Mo.App.E.D. 1982); *see also Parking Sys., Inc. v. Kans. City Downtown Redev. Corp.*, 518 S.W.2d 11,16 (Mo. 1974); *J.C. Nichols Co. v. City of Kans. City*, 639 S.W.2d 886,891 (Mo.App.W.D. 1982). Here, Plaintiffs’ expert Debo admitted that the Stormwater User Charge was fair and reasonable. (Tr.348:15-350:23,377:2-7,396:4-17.) Plaintiffs’ experts further took no issue with the process by which MSD adopted its Charge. Therefore, MSD should receive a certain amount of deference when, in good faith and in compliance with its Charter, it chooses a nationwide standard (impervious area) as the basis for its Stormwater User Charge. And, because of this deference and presumption of constitutionality, the holding in *Beatty II* that a “tie” in the *Keller* factors should go to the ratepayer (820 S.W. 2d at 221) should be reconsidered. That holding presumes that a charge is unconstitutional, ignores that it is the plaintiff’s burden to establish a Hancock violation, and begs the ultimate question to be decided by the Court.

Second, stormwater user charges based on impervious area have been held not to be taxes across the country. The federal government has legislated that such local charges are to be paid by the federal government. *See* 33 U.S.C. §1323. Impervious-based charges have been challenged in other states, and the Supreme Courts in Alabama, Colorado, Florida, Georgia, Utah, Virginia, and Washington upheld the impervious-based charges as fees using criteria very similar to the *Keller* factors. *See Densmore v. Jefferson County*, 813 So.2d 844 (Ala. 2001); *City of Littleton v. State of Colo.*, 855 P.2d

448 (Colo. 1993); *City of Gainesville v. State of Fla.*, 863 So.2d 138 (Fla. 2003); *Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So.2d 180 (Fla. 1995); *McLeod v. Columbia County*, 599 S.E.2d 152 (Ga. 2004); *Bd. of Ed. of Jordan Sch. Dist. v. Sandy City Corp.*, 94 P.3d 234 (Utah 2004); *Twietmeyer v. City of Hampton*, 497 S.E.2d 858, 859-60 (Va. 1998); *Teter v. Clark County*, 704 P.2d 1171 (Wash. 1985). It is respectfully submitted that these persuasive authorities should be duly considered, so that Missouri will not be outside the national norm relating to this important issue.

Third, MSD has a Charter and a Rate Commission that provide direct checks and balances on MSD's ability to implement and raise charges. (Pls.Ex.22 §§5.010,.030, 7.040.) MSD cannot violate its Charter. And before it can raise its charges, it must submit them to the Rate Commission process, which takes 6 months and involves public participation, and which results in a recommendation on rates that the Board must accept if it meets the requirements of the Charter. (Pls.Ex.22 §§7.270,.300; Tr.388:11-23, 635:9-18,661:19-662:20.) Indeed, the fact that MSD has a voter-adopted Rate Commission in place that held hearings and analyzed the Stormwater User Charge does have a bearing on the ultimate question of whether the charge complies with the Hancock Amendment. The Rate Commission was established to analyze proposed rates under a variety of factors, including the legality of the rate, and MSD should be able to rely on the Commission's findings in implementing a rate. Therefore, if this element is considered, it weighs in MSD's favor because there is most assuredly accountability – direct and indirect – in MSD.

Although not necessary to the analysis here because the five *Keller* factors weigh heavily in MSD's favor, the factors manufactured by Plaintiffs discussed above must be ignored, while the Court should consider the traditional deference due to rate making bodies and how other stormwater utilities are charging.

Using impervious area as the measurement of the level of service is not only the industry standard, but it makes sense because it is impervious area that causes the need for the stormwater services. The Charge is billed only after service is provided (as shown by adjustments when impervious area is added or removed), only those properties that contribute to the need for services are billed, and these properties are billed only for the services that they use. And MSD provides important and necessary services to its customers. Under the *Keller* analysis recently reaffirmed by this Court, the Stormwater User Charge is not a tax subject to the Hancock Amendment.

II. IN THE EVENT THE TRIAL COURT’S HANCOCK JUDGMENT IS AFFIRMED, THE TRIAL COURT ERRED IN AWARDING PLAINTIFFS’ COUNSEL \$4,828,828.28 IN ATTORNEYS’ FEES AND EXPENSES BECAUSE THIS AWARD IS UNREASONABLE, IMPROPER, AND CONTRARY TO MISSOURI LAW.

A. THE UNPRECEDENTED APPLICATION OF A MULTIPLIER OF 2.0 TO PLAINTIFFS’ “LODESTAR” ATTORNEYS’ FEES AMOUNT IS NOT PERMITTED.

Although this Court need not reach the issues relating to the Trial Court’s award of attorneys’ fees and expenses if it holds that the Stormwater User Charge is not a tax, that award likewise contained several errors requiring reversal.

Section 23 of the Hancock Amendment provides that a plaintiff prevailing on a Hancock challenge may recover “costs, including reasonable attorneys’ fees incurred in maintaining such suit.” In its February 3, 2011 Judgment granting in its entirety Plaintiffs’ motion for attorneys and expenses (“Fees Judgment”),¹⁵ the Trial Court took the unprecedented step of awarding Plaintiffs *double* what the lodestar fee amount of \$2,082,576.50 was in this case (which amount, in and of itself, MSD believed was unreasonable and reflected a lack of billing judgment where there was no client reviewing bills), thereby resulting in Plaintiffs’ counsel receiving a windfall award of

¹⁵ Once again, the Trial Court merely signed Plaintiffs’ proposed judgment, adding merely one paragraph (¶30) of its own. (*Compare* LF2636-49 *with* LF2586-2601.)

\$4,165,153 plus the almost \$200,000 in fees spent on the fees motion itself. The multiplier award is unprecedented under Missouri law and is clearly a misstatement and misapplication of Missouri and other persuasive law for several reasons, thus rendering the amount of fees awarded unreasonable.

At the outset, both Plaintiffs and the Trial Court recognized that there is no Missouri case, statute, or other authority allowing the award of a multiplier. (Fees J. ¶¶22(LF2643-44;A70-71); LF1822; Tr.1212:4-1213:12.) Moreover, such an enhancement is unwarranted and unreasonable in Hancock Amendment challenges when fees are sought against state and local governments because “the fees are paid in effect by state and local taxpayers, and because state and local governments have limited budgets, money that is used to pay attorneys’ fees is money that cannot be used for programs that provide vital public services.” *Perdue v. Kenny A. ex rel. Winn*, ___ U.S. ___, 130 S.Ct. 1662,1676-77 (2010)(citations omitted). While an award of the traditional lodestar amount may be awarded to a successful plaintiff, a multiplier benefits only the counsel involved. Here, an award of lodestar attorneys’ fees in excess of \$2 million for a case involving five days of trial pushed the limits of reasonableness out to the edge; the multiplier pushed reasonableness over the cliff.

As justification for awarding the multiplier, the Trial Court relied on out-of-state cases primarily from Florida and California and found that the multiplier was warranted because of the contingent risk that Plaintiffs’ counsel took in prosecuting the case. (Fees J. ¶¶22-24(LF2643-45;A70-72).) This was an error of law, and the Court of Appeals properly recognized this error and reversed the multiplier. (App.E.D.Op. at 13-15(A89-

91).) Likewise, the Courts of Appeals, Western District in *Volkswagen Group of America, Inc. v. Berry* (WD73974), reversed an attorneys' fees multiplier. This Court accepted transfer, and that case (raising similar issues regarding the viability of a multiplier) has been argued and submitted (SC92770).

When deciding issues relating to awards of attorneys' fees, Missouri courts have followed U.S. Supreme Court precedent with respect to the reasonableness or reduction of such fee awards. *See, e.g., O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64,71 (Mo.banc 1989); *Trout v. State*, 269 S.W.3d 484,488-89 (Mo.App.W.D. 2008); *Williams v. Finance Plaza, Inc.*, 78 S.W.3d 175,184-85 (Mo.App.W.D. 2002); *Browning by Browning v. White*, 940 S.W.2d 914,926 (Mo.App.S.D. 1997), *overruled on other grounds by Amick v. Pattonville-Bridgeton Terrace Fire Prot. Dist.*, 91 S.W.3d 603 (Mo.banc 2002). Therefore, it stands to reason that Missouri courts would not follow cases from California, Florida or any other state¹⁶ that are not in line with the well-reasoned and convincing U.S. Supreme Court precedents. Again, the Court of Appeals agreed with the U.S. Supreme Court's approach and specifically adopted that Court's "well-reasoned approach" in *Perdue*. (App.E.D.Mo. at 13(A89).) A concise history of the U.S. Supreme Court's rejection of the use of multipliers in statutory fee cases underscores the correctness of the Court of Appeals' approach, and the error of the Trial Court's award of a multiplier.

¹⁶ These cases are distinguished, analyzed, and shown to be inapplicable *infra* at 105-06.

In construing 42 U.S.C. §1988 (which, like Hancock, provides for a “reasonable attorney’s fee”), the U.S. Supreme Court has held: “A strong presumption that the lodestar figure – the product of reasonable hours times a reasonable rate – represents a ‘reasonable fee’ is wholly consistent with the rationale behind the usual fee-shifting statute.” *Blanchard v. Bergeron*, 489 U.S. 87,95 (1989) (quoting *Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 478 U.S. 546,565 (1986) (“*Delaware Valley I*”)).

In *Delaware Valley I*, the U.S. Supreme Court noted that fee-shifting statutes “were not designed . . . to improve the financial lot of attorneys” and found that “superior performance” was not a basis for enhancement because the quality of the attorneys’ work is reflected in the hourly rate and hours billed. *Delaware Valley I*, 478 U.S. at 565-68. Indeed, the Supreme Court recently held that the performance of counsel (which includes the results obtained) is provided for in the lodestar, except in “rare” and “exceptional” circumstances when there is evidence that the lodestar would not “attract competent counsel” or when the lodestar does not accurately reflect the market rate for the attorneys. *Perdue*, 130 S.Ct. at 1673-75(citations omitted).

Moreover, the U.S. Supreme Court has rejected the notion that an enhancement or multiplier should be awarded for the contingency risk because the lodestar again accounts for any difficulty in prevailing on the merits and such enhancement would subsidize unsuccessful contingency cases taken by attorneys. *City of Burlington v. Dague*, 505 U.S. 557,562-66 (1992). Thus, in *Dague*, the Court explicitly held “that enhancement for contingency is not permitted under the fee-shifting statutes at issue” and reversed a 25% lodestar enhancement. *Id.* at 567. The U.S. Supreme Court has discussed several

problems with enhancement based on contingency: (1) “evaluation of the risk of loss creates a potential conflict of interest between an attorney and his client” because the plaintiff’s attorney must demonstrate the weaknesses and problems with the case, while the defendant’s attorney must either concede the strength of plaintiff’s case to keep the award down or increase the amount of the award by claiming the result was “freakish”; (2) to award a contingency enhancement, the trial court would be required to retroactively estimate the plaintiff’s chances of prevailing at the outset of the case; and (3) “it penalizes the defendant with the strongest defense, and forces him to subsidize the plaintiff’s attorney for bringing other unsuccessful actions against other defendants.” *Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 483 U.S. 711, 721-22 (1987) (*Delaware Valley II*) (plurality opinion rejecting contingency enhancement).

And most recently, *Perdue* held that enhancements of the lodestar should rarely be awarded because: (1) a reasonable fee should induce a lawyer to take the case, “not to provide ‘a form of economic relief to improve the financial lot of attorneys’”; (2) there is a “strong” presumption that the lodestar is sufficient; (3) the Court never sustained enhancement for performance, but would in “rare and exceptional circumstances”; (4) the lodestar includes all relevant factors in awarding a reasonable fee, and enhancement is improper when “based on a factor subsumed in the lodestar” such as complexity of the case or quality of performance and result; and (5) the fee applicant must provide “specific evidence” to support such an award. 130 S.Ct. at 1672-73 (citations omitted).

These legal principles should control here. The \$2.1 million lodestar amount awarded Plaintiffs’ counsel is the presumptive maximum reasonable fee and, as

recognized by the Court of Appeals here, is “sufficient.” (App.E.D.Op. at 15(A91).) Furthermore, the skill and expertise of Plaintiffs’ counsel is subsumed by their hourly rates of up to \$435 per hour (i.e., the more skilled and experienced the lawyer, the higher the rate). *Delaware Valley I*, 478 U.S. at 565-66, 568. Similarly, the results obtained and the novelty or difficulty of the issues in this case are reflected by the hours billed (i.e., the more challenging the case, the more hours will be billed). *Dague*, 505 U.S. at 562-63; *Perdue*, 130 S.Ct. at 1673.

In any event, the extent of the contingency risk taken by Plaintiffs’ counsel and the Trial Court’s concern that the Stormwater User Charge would have gone unchallenged are belied by the fact that another law firm sought to intervene in this case, but Plaintiffs’ counsel successfully opposed this intervention to keep the case for themselves. (LF18-41, 538.) In other words, there was no risk of the Charge going unchallenged as other able counsel was willing to prosecute the case.

The cases from California and Florida on which the Trial Court and Plaintiffs’ counsel relied so heavily (Fees J. ¶¶22-24(LF2643-45;A70-72)) are squarely at odds with the U.S. Supreme Court decisions discussed above, are inapplicable to this case, or are even helpful to MSD’s position that no multiplier is permitted. In *Pellegrino v. Robert Half International, Inc.*, 106 Cal.Rptr.3d 265 (Cal.Ct.App. 2010), the court affirmed a 15% reduction in the lodestar to account for an unsuccessful claim, counseled trial courts to review billing records for “padding,” and awarded a multiplier where the plaintiff’s counsel went through 12 summary judgment motions and 17 days of trial (not a 5 day trial as in the case at bar) for a lodestar amount of about \$600,000. *Id.* at 267, 273-74. In

Beasley v. Wells Fargo Bank, N.A., 235 Cal.App.3d 1407,1412,1419 (Cal.Ct.App. 1991), disapproved of by *Olson v. Auto. Club of S. Cal.*, 179 P.3d 882 (Cal. 2008), the court interpreted a California statute to award a multiplier and expert witness fees. Likewise, *Amaral v. Cintas Corp.*, 78 Cal.Rptr.3d 572 (Cal.Ct.App. 2008), relied on the same California statute in awarding a multiplier for contingency risk. *Id.* at 619-20.

In *Ketchum v. Moses*, 17 P.3d 735 (Cal. 2001), the California Supreme Court held, similar to U.S. Supreme Court cases, that enhancement could not be awarded on a factor, such as skill of counsel, that was already part of the lodestar due to the risk of double counting and further held that hours incurred after a recovery was secured was not subject to a multiplier for contingent risk because no risk remains once recovery is certain. *Id.* at 746-47.

Likewise, any reliance on *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985), for a multiplier is suspect because the Florida Supreme Court subsequently modified its *Rowe* holding in *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990). In that later case, the court found “that the use of the contingency fee multiplier should be modified” when setting the fee in “public policy enforcement cases,” and, relying on the U.S. Supreme Court’s *Blanchard* decision, held that, “counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client.” *Id.* at 833-34 (citation and internal quotation marks omitted). Thus, as attorneys with fee-paying clients do not receive enhancement or multipliers, neither should Plaintiffs’ counsel here.

The legal principles established by the U.S. Supreme Court should control here because they mirror the law of Missouri, not inapplicable cases from California and Florida. Thus, the Trial Court's award of a multiplier was without basis in law, was an abuse of discretion, and must be reversed.

B. HOURS BILLED ON PLAINTIFFS' UNSUCCESSFUL REFUND CLAIM ARE NOT RECOVERABLE BECAUSE PLAINTIFFS WERE NOT THE PREVAILING PARTY ON THAT CLAIM.

The Trial Court further committed legal error by awarding fees for the amount spent on Plaintiffs' unsuccessful refund claim. It is well-settled Missouri law that a plaintiff cannot recover fees incurred on an unsuccessful claim and that the trial court should attempt to segregate those fees or reduce the award to account for the limited success. Missouri law, with a foundation on U.S. Supreme Court precedent, is clear:

If a plaintiff succeeds on some, but not all, claims, the amount of the award depends, in part, on whether the plaintiff's unsuccessful claims are related to the claims on which the plaintiff is successful. If the unsuccessful claims are "distinct in all respects" from the successful claims, the hours spent on the unsuccessful claims should be excluded from the attorneys fee award. . . . The trial court "may attempt to identify specific hours that should be eliminated." However, it may also choose to "simply reduce the award to account for the limited success."

Trout v. State, 269 S.W.3d 484,488-89 (Mo.App.W.D. 2008)(affirming trial court's 25% reduction for unsuccessful claims)(citing *Hensley v. Eckerhart*, 461 U.S. 424, 433

(1983)); *see also O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64,71 (Mo.banc 1989)(holding that plaintiff could recover fees only on successful claim and that “[t]he required segregation [between fees on claims] may be difficult, but must nevertheless be essayed”); *Alhalabi v. Mo. Dep’t of Natural Res.*, 300 S.W.3d 518,531 (Mo.App.E.D. 2009)(affirming reduction of 15% of hours billed for work done on unsuccessful claim); *Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d 60,75-76 (Mo.App.E.D. 2003)(holding it was not an abuse of discretion for the trial court to allow only the portion of fees expended on the claims on which plaintiff prevailed); *McClain v. Papka*, 108 S.W.3d 48,54 (Mo.App.E.D. 2003) (“Attorney’s fees were not warranted for services performed by [plaintiffs’] counsel on the unsuccessful claims.”); *Gilroy-Sims & Assocs. v. Downtown St. Louis Bus. Dist.*, 729 S.W.2d 504, 507-08 (Mo.App.E.D. 1987) (holding that fees were properly awarded on plaintiffs’ successful Hancock challenge, but that fees expended on a second, unsuccessful claim were not allowable).

Here, the Trial Court entered judgment in MSD’s favor on the refund claims; Plaintiffs did not prevail. Under the cases cited above, the burden was on Plaintiffs to segregate the amounts spent on the unsuccessful claim, but they chose instead to formulate a non-sensical argument that they prevailed because the denial of the refund was a victory for Plaintiffs. (Tr.1226:10-1227:23.) Not only did the Trial Court not hold Plaintiffs to task, but the Fees Judgment incorrectly included the amounts billed on the refund claim despite its judgment in MSD’s favor. The Trial Court merely found that Plaintiffs’ counsel had saved the customers from having to pay the Stormwater User

Charge in the future (which was the result of the first phase, not the refund claims), but did not find that Plaintiffs prevailed on the refund claims. (Fees J. ¶30(LF2648;A75).)

Likewise, the Court of Appeals' analysis of whether Plaintiffs are entitled to fees on the unsuccessful refund claim does not hold water. (App.E.D.Op. at 15-16(A91-92).) The majority opinion reiterates, without analysis, that the claims were intertwined and criticizes, without basis, MSD for not arguing that the refund claims arose from different facts or involved different legal theories than the Hancock claims. However, MSD has repeatedly argued that the task of separating the time devoted to the Hancock claims from the time devoted to the refund claims is not difficult due to one salient fact – this case was *bifurcated* into a first phase on the Hancock claims and a second phase on the refund claims. And the reason it was bifurcated is self-evident. The claims involved wholly different facts (e.g., analyzing the Charge in the first phase; payments and District finances in the second phase) and wholly different legal analysis and theories (e.g., *Keller* factors in the first phase; analysis of tax-refund statutes in the second phase). Thus, this was not a case of the same facts supporting two different legal theories like in *Alhalabi v. Mo. Dep't of Natural Resources*, 300 S.W.3d 518,530-31 (Mo.App.E.D. 2009). In order to avoid factual and analytical confusion, the parties stipulated to the bifurcation, and the Trial Court agreed. As a result, the task of separating out the fees from the refund claim is quite simple – any time expended on the refund phase of the trial after the Judgment on the Hancock phase is not recoverable. As shown in the record below, this amount is \$165,498.80, which should not be included in any award of fees. (LF1912.)

Nor is it correct that the certification of the refund class and the obtaining of injunctive relief warrant the award of the fees on the refund claim. First, if anything, certification of the refund class was to MSD's, not Plaintiffs', benefit because it foreclosed any customer from seeking a refund of the Stormwater User Charge. Second, the issue of injunctive relief was barely at issue in the refund phase; it was clear that an injunction was going to issue, and MSD ceased collecting the Charge before the refund phase. (Tr.1382:2-1383:21.)

Therefore, because it is clear that Plaintiffs did not prevail on their refund claims and because the time spent on these claims is amenable to easy segregation, it was error for the Trial Court to include this time in the Fees Judgment, and reversal is further warranted on this ground.¹⁷

C. EXPENSES AND EXPERT FEES (EXCEPT FOR DEPOSITION TIME) ARE NOT RECOVERABLE UNDER THE HANCOCK AMENDMENT OR DECLARATORY JUDGMENT ACT, WHICH PROVIDES ONLY FOR RECOVERY OF "COSTS."

The Trial Court further erred by awarding Plaintiffs all of their out of pocket litigation expenses, including over \$400,000 in expert fees, on the basis that the term

¹⁷ As a result of Plaintiffs' steadfast refusal to segregate the time spent on the refund claims, an outright reversal is appropriate. Alternatively, this Court could modify the award based on the reductions suggested by MSD (LF1903-12), or the case could be remanded for reexamination of the fees relating to the refund claim.

“costs” as used in §23 of the Hancock Amendment and in the Declaratory Judgment Act (Mo.R.Civ.P. 87.09) means all expenses and not the traditional, narrow definition of costs. *See Groves v. State Farm Mut. Auto. Ins. Co.*, 540 S.W.2d 39,44 (Mo.banc 1976); *Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d 60,76 (Mo.App.E.D. 2003); *Briner Elec. Co. v. Sachs Elec. Co.*, 703 S.W.2d 90,91 (Mo.App.E.D. 1985). The traditional, narrow definition of “costs” should control, and the Trial Court erred in expanding the definition to award Plaintiffs their expert fees and other non-recoverable out-of-pocket expenses.

First, on a basic level, Plaintiffs did not plead or pray for the recovery of “out of pocket expenses,” “litigation expenses,” or “expert fees,” and Plaintiffs’ counsel should not be entitled to something that was not sought in any of the petitions filed in this case.

Second, if the drafters of the Hancock Amendment intended for expert fees and all expenses to be recoverable under Section 23, they presumably would have used those terms rather than the narrowly construed term “costs.”¹⁸ Indeed, when the Missouri legislature has provided for recovery of expert fees or other litigation expenses, it has expressly stated that those expenses are recoverable. *See, e.g.*, R.S.Mo. §§136.315.1(4) (“Reasonable litigation expenses” defined to include “attorneys’ fees and fees for expert and other witnesses”); 407.835.1 (“actual and reasonable expenses of litigation, including, but not limited to, . . . expert witness, and attorney fees”); 444.880.4 (“costs of

¹⁸ To the extent *Roberts v. McNary*, 636 S.W.2d 332 (Mo.banc 1982), provides for the recovery of expenses under the Hancock Amendment, the case should be overruled under the plain meaning of §23 of the Hancock Amendment.

litigation (including attorney and expert witness fees”); 523.259(1) (“reasonable attorneys’ fees, expert expenses and costs”); 536.085(4) (“Reasonable fees and expenses” defined to include “reasonable expenses of expert witnesses”). Therefore, as a matter of basic interpretation, the term “costs” should not be read to include a full range of expenses, including expert witness fees.

Third, as noted above, Missouri courts have defined the terms “costs” narrowly so that “[a]n item is not taxable as costs in a case unless it is *specifically authorized* by statute, or by agreement of the parties.” *Groves v. State Farm Mut. Auto. Ins. Co.*, 540 S.W.2d 39,44 (Mo.banc 1976)(emphasis added); *see also Kaplan*, 166 S.W.3d at 76 (same); *Briner Elec. Co. v. Sachs Elec. Co.*, 703 S.W.2d 90,91 (Mo.App.E.D. 1985). Here, the vast majority of the \$458,000 in expenses for which Plaintiffs’ counsel seek reimbursement have not been authorized by statute and should not be paid by MSD.

Generally, Missouri law is clear that parties must bear their own expert witness fees, except for reimbursement for deposition time as provided in Mo.R.Civ.P. 56.01. *See Fairbanks v. Weitzman*, 13 S.W.3d 313,329 (Mo.App.E.D. 2000)(holding that only expert time for deposition was recoverable, not time spent preparing for the deposition); *Nichols v. Bossert*, 727 S.W.2d 211,213-14 (Mo.App.E.D. 1987)(“The general rule is each party is responsible . . . for paying the fees necessary to bring in experts needed to make his case. Fees are only to be awarded in exceptional circumstances.”)(citation omitted); *McClue v. Epstein*, 492 S.W.2d 97,98 (Mo.App.K.C. 1973)(“What is involved here is an attempt by a party to obtain reimbursement in the guise of costs of amounts spent by him in the preparation of his case through the employment of an expert witness.

Plaintiff cites no statute of this State authorizing the taxation of this type of expense as costs.”). Therefore, absent any statutory authority, Plaintiffs’ counsel are entitled only to the time spent by Messrs. Jones and Debo being deposed in this case. From a review of the experts’ bills, these amounts are \$1,947.00 for Mr. Jones’s December 16, 2009 deposition, \$1,400.00 for Mr. Debo’s December 22, 2009 deposition, and \$1,215.00 for Mr. Jones’s March 31, 2010 deposition. (LF1928.)

Moreover, an examination of the cases relied on by the Trial Court (Fees J. ¶¶26-27(LF2646-47;A73-74).) shows no such circumstances exist here that would entitle them to a recovery of their expert expenses. Unlike in *Knopke v. Knopke*, 837 S.W.2d 907 (Mo.App.W.D. 1992), and *Jesser v. Mayfair Hotel, Inc.*, 360 S.W.2d 652 (Mo.banc 1962), this is not a case where plaintiffs succeeded in creating and maintaining a common fund to benefit others. In *Jesser*, the trust agreement specifically provided for recovery of litigation expenses from the trust. *Id.* at 663. Nor is the situation in this case like the special circumstances set out in *Travelers Indemnity Co. v. Bruns*, 701 S.W.2d 195 (Mo.App.E.D. 1985). In that case, expert fees in the amount of \$790 were awarded where the prevailing party needed to hire an expert witness on the validity of a letter, which should have been avoided had opposing counsel addressed the obvious problems with the letter with his clients. *Id.* at 197. And, although it does not address expert fees, *DCW Enterprises, Inc. v. Terra du Lac Association*, 953 S.W.2d 127 (Mo.App.E.D. 1997), sets out the special and unusual circumstances where fees can be awarded, which are limited to trust and estate cases and the creation or preservation of a fund to which non-litigants have a right. *Id.* at 132 (also denying request for attorneys’ fees). None of

these circumstances exist here, and each side should bear the costs of its experts in line with settled Missouri law.¹⁹

Further, many of the other items sought by Plaintiffs' counsel are not authorized by statute. Plaintiffs' counsel seeks \$26,134.01 for photocopying expenses, but there is no "statutory authority for taxing as costs photocopying expenses." *Kaplan*, 166 S.W.3d at 76. They further seek over \$14,175.50 in surveyor fees, which are likewise not recoverable as costs (not to mention highly unnecessary here). *See Anderson v. Howald*, 897 S.W.2d 176, 181 (Mo. App. S.D. 1995). Furthermore, there is no specific authorization for seeking to tax as costs for such items as Federal Express deliveries, courier services, travel expenses, and various miscellaneous charges relating to overtime, research and discovery, which come to a total of \$8,091.01. (LF1929.) These amounts should not be recovered as costs.

In the end, under Missouri law, Plaintiffs are entitled to recover \$16,074.53 for deposition transcripts, \$4,562.00 for their experts' depositions, \$117.00 for filing and service of the petition, \$3,457.50 for local counsel (which should really be recovered as attorneys' fees), and \$206.90 relating to service of subpoenas.

¹⁹ If Plaintiffs' counsel were entitled to reimbursement for expert witness fees, the \$400,000 sought here is highly unreasonable. First, Plaintiffs' experts incurred a high amount of fees preparing two reports, including an academic report over 80 pages in length. Tellingly, the only relevant part of this lengthy report was about 10 pages that were admitted into evidence at trial. (Pls.Ex.67.)

Therefore, under these authorities, the Trial Court erred in awarding Plaintiffs approximately \$442,821 (of the \$471,072.28 awarded) for these expenses, and the Fees Judgment for this amount should be reversed.

Conclusion

As shown above, the Trial Court erred in its interpretation of the five *Keller* factors and compounded this error by misapplying the law to the facts. Viewed under the standards set out in *Arbor* and *Missouri Growth*, the Stormwater User Charge is unquestionably a true user charge under the *Keller* analysis and is not a tax under the Hancock Amendment. Reversal of the Judgment (along with the related Fees Judgment) and entry of a judgment in MSD's favor are thus warranted.

KOHN, SHANDS, ELBERT,
GIANOULAKIS & GILJUM, LLP

/s/ Kevin Anthony Sullivan
John Gianoulakis - #18194
Robert F. Murray - #41779
Kevin Anthony Sullivan - #55140
1 North Brentwood Blvd., Suite 800
St. Louis, Missouri 63105
(314) 241-3963 telephone
(314) 241-2509 facsimile
jgianoulakis@ksegg.com
rmurray@ksegg.com
ksullivan@ksegg.com

METROPOLITAN ST. LOUIS SEWER
DISTRICT

Susan M. Myers - #46208
2350 Market Street
St. Louis, Missouri 63103
(314) 768-6200 telephone
(314) 768-6279 facsimile
smyers@stlmsd.com

Attorneys for Appellant/Cross-Respondent
Metropolitan St. Louis Sewer District

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Substitute Brief of Appellant/Cross Respondent Metropolitan St. Louis Sewer District was served on this 19th day of December, 2012, through the electronic filing system on:

Richard R. Hardcastle, III
(rrh@greensfelder.com)
Erwin O. Switzer
(eos@greensfelder.com)
Kirsten Ahmad
(km@greensfelder.com)
Greensfelder, Hemker & Gale, P.C.
10 South Broadway, Suite 2000
St. Louis, MO 63102

Elizabeth J. Hubertz
Interdisciplinary Environmental Clinic
Washington University School of Law
One Brookings Drive
Campus Box 1120
St. Louis, MO 63130
(ejhubertz@wulaw.wustl.edu)

Howard C. Wright, Jr.
Carnahan, Evans, Cantwell & Brown
2113 E. Rosebrier Place
Springfield, MO 65804
(howardwrightjr@me.com)

Aimee Davenport
Lathrop & Gage, LLP
314 E. High Street
Jefferson City, MO 65101
(adavenport@lathropgage.com)

Douglas L. Healy
Healy & Healy, Attorneys at Law, LLC
939 Boonville, Suite A
Springfield, MO 65802
(doug@healylawoffices.com)

Matthew A. Jacober
Lathrop & Gage, LLP
7701 Forsyth Blvd., Suite 500
Clayton, Missouri 63105
(mjacober@lathropgage.com)

/s/ Kevin Anthony Sullivan

CERTIFICATE REQUIRED BY RULE 84.06(c)

The undersigned hereby certifies that the foregoing Substitute Brief of Appellant/Cross-Respondent Metropolitan St. Louis Sewer District (1) includes the information required by Rule 55.03 and (2) complies with the limitations contained in Rules 84.06(b) in that it contains 30,975 words (excluding the cover, signature block, certificate of service and this certificate) according to the word count of the Microsoft Word 2003 word-processing system used to prepare the brief.

/s/ Kevin Anthony Sullivan